

The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part I)*

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* "How the contents of these doctrines relate to each other, and whether the combination of them makes any sense, has been a matter of underlying but seldom acknowledged concern." George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEXAS L. REV. 231, 234 (1988).

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I. INTRODUCTION

In *Miranda v. Arizona*, the Supreme Court explicitly held that the Fifth Amendment's privilege against compulsory self-incrimination was applicable to police interrogation of a suspect in custody and supplied the test for determining the admissibility of the suspect's confession.¹ In taking this position, the Court necessarily rejected the view of dissenting Justices Harlan and White that the admissibility of confessions should be determined not by the Fifth Amendment's privilege, but by the due process rule that bars involuntary confessions. Before *Miranda*, the due process rule had been the principal constitutional restriction on the admissibility of police-induced confessions.² The most influential authority upon which the dissenting opinions rested was the 1961 revision of Wigmore's *Evidence* which stated that "[t]he privilege at common law did not apply to police interrogations, and, in view of the development of the complementary constitutional doctrine excluding coerced confessions, it is doubtful that there is sufficient reason today to distort the [constitutional] privilege to cover this situation."³ Wigmore's rationale was that

Since police have no legal right to compel answers, there is no legal obligation to which a privilege in the technical sense can apply. That is, it makes no sense to say that one is privileged not to disclose—that one is

¹ 384 U.S. 436, 458–67 (1966).

² See *id.* at 510–11 (Harlan, J., dissenting); *id.* at 526, 528 (White, J., dissenting).

³ 8 JOHN H. WIGMORE, EVIDENCE § 2252, at 328–29 (McNaughton rev. 1961) [hereinafter 8 WIGMORE] (cross-reference omitted).

excused from the legal consequences of contumacy—when there are no legal consequences of contumacy.⁴

Although *Miranda* was controversial, particularly in the late 1960s, the sticking point was that the Court had interpreted the privilege to require the police to give advice and obtain a waiver before engaging in custodial interrogation. Largely as a result of two trenchant articles by Professor Yale Kamisar,⁵ even those who disparaged *Miranda*'s advice/waiver approach seemed to accept that the Court was correct in applying some version of the privilege to police interrogation.⁶ Indeed, while roundly condemning *Miranda* and urging that it be overruled, the United States Department of Justice under Attorney General Edwin Meese III conceded that "[t]he applicability of the Fifth Amendment at [the police interrogation] stage is in fact consistent with the historical understanding of the Fifth Amendment right."⁷

In recent years, however, some of the the scholarly literature has disclosed a yearning to return to the days when the due process rule was the only constitutional law test for determining the admissibility of confessions obtained by police interrogation.⁸ The Supreme Court is probably congenial to this view. Referring to police interrogations that fall outside the scope of *Miranda*, Chief Justice Rehnquist said for the Court in *Colorado v. Connelly*, "The Court has retained this due process focus, even after holding, in *Malloy v. Hogan*, 378 U.S. 1 (1964), that the Fifth Amendment privilege against compulsory self-incrimination applies to the States."⁹ Implicit in this statement is the

⁴ *Id.* at 329 n.27.

⁵ Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966) [hereinafter Kamisar, *Dissent*]; Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in CRIMINAL JUSTICE IN OUR TIME 1 (A.E. Dick Howard ed., 1965) [article hereinafter Kamisar, *Equal Justice*]. These articles are reprinted in YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS 27, 41 (1980).

⁶ See Joseph D. Grano, *Voluntariness, Free Will and the Law of Confessions*, 65 VA. L. REV. 859, 926-27 (1979).

⁷ OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION 42 (1986).

⁸ See, e.g., Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1468, 1473-74 (1985); cf. Joseph D. Grano, *Introduction—The Changed and Changing World of Constitutional Criminal Procedure: The Contribution of the Department of Justice's Office of Legal Policy*, 22 U. MICH. J.L. REF. 395, 397-98 (1989) (approving pre-*Miranda* cases that upheld the admissibility of confessions although the police denied the suspect's request for counsel).

⁹ *Colorado v. Connelly*, 479 U.S. 157, 163 (1986). This statement jibes with one made 12 years earlier by then-Justice Rehnquist in *Michigan v. Tucker*, 417 U.S. 433 (1974), in which the Court held that the suspect's confession had not been "compelled" by police interrogators in violation of his Fifth Amendment protection. One of the factors mentioned by Justice Rehnquist was that "there were no legal sanctions, such as the threat of contempt,

position that the Fifth Amendment privilege and the due process rule are separate and distinct, that each has a separate sphere of operations, and that the sphere of the privilege does not include police interrogation. This position is explicitly stated in *Wigmore*.¹⁰ Consequently, should the Supreme Court ever decide to dispatch *Miranda*, it is likely to buttress its opinion with the scholarship and reputation of *Wigmore*.¹¹

But was *Wigmore* right? Why are there separate rules? Why should one set of interrogation cases be governed by the Fifth Amendment privilege and another set (the police interrogation set) by due process standards? These questions, which jumped off the page when I carefully read *Connelly*, set me on the path of trying to ascertain what rules historically governed interrogations of all sorts in the English and American systems both before and shortly after the Fifth Amendment was adopted. I wanted to learn whether the privilege and the involuntary confession rule were really distinct; why, in view of the existence of the privilege, any other doctrine emerged regarding the admissibility of confessions; and whether there was reason for applying the involuntary confession rule, but not the privilege against compulsory self-incrimination, to police interrogation.

These questions required close study of the history of both doctrines. This proved to be more daunting than it sounds because I found no history of the privilege that was long enough to give a flavor of the crucial events, but short enough not to overwhelm a researcher for whom history is but one of many considerations. I found also that although there are many discussions of each doctrine apart from the other, there is no single source that integrates a history of both doctrines. In the present Article, I seek to remedy that situation. In Part II, I divide a historical time-line into eight segments and consider, in connection with each segment, the history of the privilege and other doctrines relating to the admissibility of confessions. The focal point of this discussion is the common law.

In Part III, I ask whether there is a relationship between the common law exclusion of involuntary confessions and the common law protection against

which could have been applied to respondent had he chosen to remain silent." *Id.* at 445 (emphasis added). Since there never are *legal* sanctions, such as contempt, for refusing to answer a police officer's questions, reliance on this factor implies a rejection of the Fifth Amendment as a protection against coercive police interrogation. See *supra* notes 3-4 and accompanying text.

¹⁰ See 8 WIGMORE, *supra* note 3, § 2252, at 328-29; *id.* § 2266, at 401.

¹¹ At a conference on constitutional law and the decisions of the Supreme Court's 1989 Term, Dean Jesse Choper opined that the Court was more likely to "chip away" at *Miranda* than to overrule it. See *Constitutional Law Conference*, 59 U.S.L.W. 2272, 2273 (Nov. 6, 1990). Professor Yale Kamisar put the matter more bluntly. "In reality, Kamisar said, the court doesn't have to overrule *Miranda* or some of the other 'liberal' Warren Court precedents to achieve a more conservative result 'because these cases have already been so battered there's not much left to overrule.'" *Id.* at 2277.

compulsory self-incrimination. In connection with these matters, I set out Wigmore's position (Part III A) and evaluate it in terms of the operation, history, and objectives of both common law protections (Part III B). I conclude, contrary to Wigmore, (1) that there is great similarity between the common law protections and (2) that the involuntary confession rule appears to be no more than the exclusionary function of the privilege. Not quite satisfied with the second conclusion, I pursue the matter further and identify two situations in which certain action does not violate the privilege but nevertheless does produce a confession of such dubious reliability as to call for exclusion under an evidentiary rule independent of the privilege. In these two situations, the involuntary confession rule serves a unique purpose. In all other situations, however, it serves no purpose and should be abandoned in favor of the privilege. In light of this conclusion, I reassess and explain the English and American cases and treatises that seem to support Wigmore's view (Part III C).

In Part IV, I reconsider the matters discussed in Part III, but in the constitutional context of the Fifth Amendment privilege against compulsory self-incrimination and the due process rule barring involuntary confessions. I conclude that, largely as a result of *Colorado v. Connelly*, the constitutional protections are even more alike than their common law analogues. This conclusion leads me to ask (Part IV E 2 and 3) why the Supreme Court wants to resolve confession cases by using the Due Process Clause in preference to the Fifth Amendment privilege. My answer is that the Court may perceive the due process approach as more flexible and malleable, hence more manipulable in the service of admitting confessions. Finally, in Part V, I confront the question of the applicability to police interrogation of the common law and constitutional protections against compulsory self-incrimination. I look at the logic of the Wigmore position and find it flawed. Then I consider the issue in terms of the history, operations, and objectives of the privilege, as well as from a general policy perspective. This discussion reveals that there is no reason for withholding the privilege from police interrogation and strong reason for applying it.¹²

¹² I am concerned in this Article only with questions that are anterior to the question of whether the Court was right in *Miranda* in interpreting the privilege to require advice and waiver as a constitutional predicate for custodial police interrogation. One who accepts all the conclusions of this Article may still take the position that the Court wrongly decided *Miranda*.

II. HISTORY

A. Early History

Some time before the 1100s, separate systems of ecclesiastical and lay courts developed in England¹³ and "the English ecclesiastical courts [became] branches of an international court system of the Roman Church."¹⁴ Both systems initially used similar procedures, but eventually followed drastically different roads.¹⁵ In criminal cases of the late 1100s and early 1200s, lay courts began to use procedures which developed much later into formal accusation by a grand jury and adjudication by a trial or petit jury. The procedures were accusatorial in the sense that there were a definite charge, a known accuser, and open, rather than secret, proceedings.¹⁶ The accuser was initially an individual, but later became a representative group of the vicinage, leading to what we now call the grand jury.¹⁷

In 1215, the Barons forced King John to sign Magna Carta. Chapter 36 provided that a "writ of inquisition of life and limbs" should be given without charge.¹⁸ This writ was used to transfer a case from a mode of private accusation, which might be actuated by malice, to a mode of public accusation (the precursor of the grand jury).¹⁹ The fact that Magna Carta made it easier to obtain the writ shows the importance that was attached to an accusatorial mode of procedure in the lay courts.

Chapter 38 of Magna Carta provided, "No bailiff for the future shall, upon his own unsupported complaint put anyone to his law without credible witnesses brought for this purpose."²⁰ The word "law" certainly referred to at least some older modes of adjudication,²¹ but the meaning of Chapter 38 as a whole is not clear. Professor McKechnie believes that it includes a stricture against forcing a person to undergo trial by various forms of ordeal or by oath

¹³ LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 43 (1968); 8 WIGMORE, *supra* note 3, § 2250, at 270.

¹⁴ Neill H. Alford, *The Right of Silence*, 79 YALE L.J. 1618, 1623 (1970) (reviewing LEVY, *supra* note 13).

¹⁵ LEVY, *supra* note 13, at 4-5.

¹⁶ *Id.* at 7.

¹⁷ *Id.* at 5, 10-11.

¹⁸ WILLIAM S. MCKECHNIE, *MAGNA CARTA* 359 (2d ed. 1958). In discussing Magna Carta in both the text and footnotes of this Article, I shall follow Professor McKechnie and use the numbering of the chapters of the 1215 charter. However, the charter was reissued on several occasions in different versions with different numbering. For a discussion of the various versions, see MCKECHNIE, *supra*, at 138-59.

¹⁹ LEVY, *supra* note 13, at 13-14; MCKECHNIE, *supra* note 18, at 361-62.

²⁰ MCKECHNIE, *supra* note 18, at 369-70.

²¹ *Id.* at 370, and 370 n.2. See also James B. Thayer, *Law and Fact in Jury Trials*, 4 HARV. L. REV. 147, 157-58 (1890).

of compurgation²² based only on vague suspicion or the "unsupported statement of the royal bailiff."²³ Rather, an accusing jury was necessary.²⁴ Once the formal accusation was made, however, it was appropriate to "adjudicate" or dispose of the case by using a mechanism such as the oath of compurgation. In later centuries, Chapter 38 was relied on to resist a different oath—the oath *ex officio* (compelled by virtue of the interrogator's office)—to which it has no reference, and that oath, as we shall see, played a crucial role in the struggle for protection against compulsory self-incrimination.²⁵

We shall also see reliance on Chapter 39, which provides, "No freeman shall be taken or imprisoned . . . nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."²⁶ Centuries later, with no greater justification than under Chapter 38, the "law of the land" provision was conscripted to battle the oath *ex officio*.²⁷

In the same year that Magna Carta was signed, Catholic clergy worldwide were forbidden from participating in the administration of ordeals.²⁸ Since trial by ordeal was predicated upon religious assumptions and required the clergy's participation, that mode of disposition died in England and Western Europe in both ecclesiastical and lay courts,²⁹ and it became necessary to find a substitute. In English lay courts, the existing accusatorial system began to move in the direction of trial by jury. In English ecclesiastical courts and throughout Western Europe, a system began which crucially involved both "inquisition" and "oath."³⁰ Initially used to discover and punish the misdeeds of the clergy, these devices came to be used against suspected heretics.³¹ Professor Levy describes the process of accusation and proof in ecclesiastical courts as follows:

The remodeled criminal procedures of the canon law, after 1215, described three modes of prosecution. The first, the *accusatio*, was the traditional form. A private person, on the basis of some information or

²² A "compurgator" was "[o]ne of several neighbors of a person accused of a crime . . . who appeared and swore that they believed him on his oath." BLACK'S LAW DICTIONARY 288 (6th ed. 1990).

²³ MCKECHNIE, *supra* note 18, at 373-74.

²⁴ *Id.* at 373. See also James B. Thayer, *The Older Modes of Trial*, 5 HARV. L. REV. 45, 48 (1891).

²⁵ See *infra* notes 32-39, 100, 103, 116, 161 and accompanying text.

²⁶ MCKECHNIE, *supra* note 18, at 375.

²⁷ For a discussion of the purposes of Chapter 39, see MCKECHNIE, *supra* note 18, at 375-95. For reliance on Chapter 39, see *infra* notes 46-47 and accompanying text.

²⁸ "The most ancient species of trial . . . it being supposed that supernatural intervention would rescue an innocent person from the danger of physical harm to which he was exposed. . . . The ordeal was of two sorts—either fire ordeal or water ordeal" BLACK'S LAW DICTIONARY 1095-96 (6th ed. 1990).

²⁹ LEVY, *supra* note 13, at 14.

³⁰ *Id.* at 14-16, 20.

³¹ *Id.* at 20-22.

evidence available to him, voluntarily accused another and thereby became a party to the prosecution, taking upon himself the task of proof. He also took upon himself the risk of being punished in the event that the prosecution failed. The second form of prosecution was the *denunciatio*, which enabled the private accuser to avoid the danger and burden of the *accusatio*. Either an individual or the synodal witnesses played the role of informer, secretly indicting or denouncing someone before the court. The judge himself then became a party to the suit *ex officio*, by virtue of his office, and conducted the prosecution for the secret accuser. The third form was the *inquisitio*, by which the judge combined in his person all roles—that of accuser, prosecutor, judge, and jury. Technically the judge could not institute a suit unless an important preliminary condition had first been met; he must satisfy himself that there were probable grounds for the *inquisitio*. This was the canon law's equivalent of the grand jury of presentment of the English common law. The canon law required that an accusation must rest on *infamia*—infamy or bad reputation—which was established by the existence of either notorious suspicion (*clamosa insinuatio*) or common report (*fama*), which was some sort of public rumor. But the inquisitor himself, supposedly a wise and incorruptible man, was the sole judge of the existence of *infamia*, and his own suspicions, however based or baseless, were also adequate for the purpose of imprisoning the suspect and putting him to an inquisition. The Fourth Lateran Council prescribed no form for the establishment of *infamia* if the judge decided to proceed *ex officio mero*, that is, of his own accord or at his discretion.

One of the "most odious features," as Esmein said, of the whole inquisitional procedure that was introduced by the Fourth Lateran Council was the new oath the suspect was required to swear. It was the oath *de veritate dicenda*, to tell the truth to all interrogatories that might be administered, a seemingly innocuous obligation which in reality was an inescapable trap, a form of spiritual torture, *tortura spiritalis*, calculated to induce self-incrimination. Confession of guilt was central to the whole inquisitional process, and the oath, which was administered at the very outset of the proceedings, was reckoned as indispensable to the confession. The accused, knowing neither the charges against him, nor his accusers, nor the evidence, was immediately placed between hammer and anvil: *he must take the oath or be condemned as guilty*, yet if he took the oath he exposed himself to the nearly certain risk of punishment for perjury—and his lies were evidence of his guilt—or condemned himself by admissions which his judge regarded as damaging, perhaps as a confession to the unnamed crime. The oath *de veritate dicenda* was thus virtually a self-incriminatory oath. Because it became associated with the Inquisition, it became known as the inquisitional oath; and because it originated in connection with a proceeding in which the judge served *ex officio* as indicator, assailant, and convictor, it was also called the oath *ex officio*.³²

³² LEVY, *supra* note 13, at 22–24 (emphasis added) (footnotes omitted). The internal quotation is from ADHEMAR ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE 82 (John Simpson trans., 1914).

Obtaining the suspect's confession was often the only way of complying with the canon law's requirement of "perfect or complete" proof.³³ Confession, therefore, became "the name of the game."

Early in the development of the ecclesiastical process, the proceeding *ex officio mero* was rarely used and the suspect was therefore ordinarily entitled to know the charge and the name of his accuser. However, as the battle against heresy heightened, the *ex officio* proceeding replaced the others, procedural protections were removed, and torture was used on the continent to obtain confessions.³⁴

The usual course of [an ecclesiastical] trial, which consisted of the secret examination [by the judge] of the accused under oath, was to confront him with the mass of surmises and rumors and hearsay against him and demand his confession.

...

[T]he accusation and prosecution rested entirely with the court. . . .³⁵

By contrast, the English lay system, once matured, "was based on the presentment by grand jury, the written indictment, and trial by jury."³⁶ In this system, the judge "remained essentially a referee of a private fight, enforcing the observance of the rules by both parties."³⁷

The final matter in this brief introduction is that the oath *de veritate dicenda* was abolished in canon law in 1725. One of the grounds was that the confessions produced by it were unreliable.³⁸ This point will take on greater importance as we see the close relationship between the oath and the struggle in England to obtain protection against compulsory self-incrimination, and as we ask whether there is a distinction between that protection and the rule barring the admissibility of involuntary confessions.

B. 1246-1368

1. Compelled Self-Incrimination

The oath *ex officio* was first used in England in 1246 by Bishop Grosseteste, who "conducted 'strict Inquisitions' into the sexual misconduct

³³ LEVY, *supra* note 13, at 26-27. See also JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF 4-5 (1976) [hereinafter LANGBEIN, TORTURE].

³⁴ LEVY, *supra* note 13, at 25-28.

³⁵ *Id.* at 28-29.

³⁶ *Id.* at 29.

³⁷ *Id.*

³⁸ *Id.* at 24 (citing Helen Silving, *The Oath: I*, 68 YALE L.J. 1329, 1346-47 (1959)).

and general immorality of the people of his diocese of Lincoln.”³⁹ Their outrage led Henry III to characterize the oath as contrary to “ancient Customs . . . [and] peoples Liberties” and to enjoin Lincolnites from answering any of the Bishop’s questions under oath except in matrimonial or testamentary matters.⁴⁰ Bishop Grosseteste defied the Crown and used the threat of excommunication to force people to take the oath and answer. Henry was not amused. In 1252, he directly enjoined Grosseteste. It is not known whether the injunction was obeyed.⁴¹

The Archbishop of Canterbury revived the oath in 1272, and the Church suddenly found itself opposed by a new adversary: the common law courts. These courts, which may have been concerned about encroachment on their own jurisdiction, apparently attempted to enjoin the church courts from exercising their jurisdiction. As a result, Parliament in 1285 and again in 1316 ordered common law judges to desist.⁴²

Sometime before 1326, a statute, *Prohibitio Formata de Statuto Articuli Cleri*, was enacted.⁴³ It defined the exclusive jurisdiction of the common law courts and prohibited ecclesiastical courts from exercising jurisdiction over the same matters. Moreover, it effectively outlawed the oath *ex officio* in ecclesiastical cases other than matrimonial and testamentary.⁴⁴ The ecclesiastical courts ignored the statute, perhaps because the same oath was used by the King’s Council (the Privy Council). The Council, which functioned sometimes as a court and which later spawned both the Court of Star Chamber and the Court of High Commission, was influenced by ecclesiastical procedure. Consequently, it took cases on suggestion of wrongdoing, used an inquisitorial oath and interrogatories, and withheld from suspects precise information about the charge.⁴⁵

Between 1331 and 1347, Parliament thrice assailed the on-oath examinations of Privy Council as repugnant to the “law of the land” provision of Chapter 39 of Magna Carta,⁴⁶ a position that was without historical foundation.⁴⁷ In 1352, Parliament decreed that Magna Carta was applicable to

³⁹ *Id.* at 47.

⁴⁰ *Id.*

⁴¹ *Id.* at 48.

⁴² *Id.*

⁴³ *Prohibitia Formata de Statuto Articuli Cleri*, 9 Edw. 2 1315–16 (Eng.); 1 STAT. AT LARGE (Eng.) 403 (Danby Pickering ed., 1762).

⁴⁴ LEVY, *supra* note 13, at 49. Wigmore’s view was that both the objections to the oath and the enactment of *De Articuli Cleri* were salvos in a battle over the *jurisdiction* of ecclesiastical courts and did not involve any aversion to the oath as such. 8 WIGMORE, *supra* note 3, § 2250, at 271–77. Wigmore’s position has been attacked by reputable scholars. See the materials collected in 8 WIGMORE, *supra* note 3, § 2250, at 267 n.1.

⁴⁵ LEVY, *supra* note 13, at 49–51.

⁴⁶ *Id.* at 51.

⁴⁷ See *supra* note 27 and accompanying text.

Council. Two years later, it attempted to outlaw the oath in Council proceedings.⁴⁸ Within a decade, Parliament renewed its protests and enacted in 1368 the last of the so-called "Magna Carta statutes." This one sought to mandate accusatorial procedures in Council. Although the Magna Carta statutes were failures in their own time, they became important precedents two centuries later.⁴⁹

To summarize, during the period 1246–1368, there was objection to a compulsory oath, but apparently no objection to compulsory self-incrimination *per se*. That developed much later out of the objection to the oath. The objection to the oath occurred in different contexts. One context concerned the Church inquiring into the conduct of its own adherents. The second, which dealt with the effort of the legislative branch to assert itself against an agency of the Crown, involved objection to the use of the oath in a temporal court. The basis for these objections to on-oath examinations is not clear. It might have been some substantive religious value that opposed swearing. It might also have been, as later became the case,⁵⁰ the principle that a person should not be subjected to the mental anguish of a compulsory, on-oath examination absent the substantial justification provided by the open accusation of a known accuser.⁵¹ In the same period, there was the beginning of a conflict between rival court systems. At first, this conflict involved jurisdiction rather than objection to an oath. Later, as we shall see, it became a third context for the battle against the oath and yet another precursor to the protection against compulsory self-incrimination.⁵²

2. Admissibility of Confessions

During the same period, there was nothing in English law that even remotely addressed the subject of the admissibility of confessions. The reason is simple: there was no law of evidence. Although trial by jury had begun to replace older modes of proof, jurors were selected because they had knowledge of the matter in question. It was not until the jury became an uninformed body that a law of evidence developed.⁵³

⁴⁸ LEVY, *supra* note 13, at 52.

⁴⁹ *Id.* at 53.

⁵⁰ See *infra* notes 61–63, 66, 83–84, 96–97, 99, 113 and accompanying text.

⁵¹ For a discussion of the idea of "individual sovereignty" and the role it played in the development of the protection against compulsory self-incrimination, see *infra* notes 431–32 and accompanying text.

⁵² See *infra* notes 158–59 and accompanying text.

⁵³ See generally JAMES B. THAYER, *PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* (Boston, Little, Brown 1898).

C. 1368–1553

1. *Compelled Self-Incrimination*

The late 1300s saw the beginning of three hundred years of religious strife in England. The oath *ex officio* became an important tool of religious persecution, first of Protestants by Catholics, then of Catholics by Protestants, and finally of Puritans by Anglicans.

There is little to note about the early days of this period. Walter Brute attacked oaths as contrary to Christ's admonition "Thou shalt not swear at all."⁵⁴ Some refused to take the oath and others refused to answer questions after taking the oath. Their very refusal was regarded as evidence against them, and they were treated as guilty (*pro confesso*) and excommunicated.⁵⁵ Apparently taking no chances with recalcitrants in its battle against heresy, the Catholic Church enlisted the state. In 1401, Parliament enacted the statute *De Haeretico Comburendo*.⁵⁶ The statute gave the Bishops power to arrest and jail anyone "defamed or evidently suspected" of heresy.⁵⁷ It also put Parliament's imprimatur on the oath *ex officio*, and mandated burning for "[o]bstinate or relapsed heretics."⁵⁸ An inquisition against early Protestants had begun which lasted for almost a century and a half. During that period, thousands of persons were examined by oath *ex officio* about their religious beliefs and practices. Until 1532, none refused to answer.⁵⁹

In 1532, the Archbishop of Canterbury conducted an inquiry into the suspected heresy of John Lambert. Lambert became the first person on record to claim that the oath was unlawful, saying, "No man is bound to bewray [accuse] himself," to which, according to Professor Levy, "he appended the

⁵⁴ LEVY, *supra* note 13, at 56. The passage from the Bible is found at *Matthew* 5:33.

⁵⁵ LEVY, *supra* note 13, at 55. Professor Levy states that John Ashton, priest, scholar, and disciple of Wycliffe, "having taken the oath, refused to answer questions about his religious beliefs; he was therefore taken '*pro confesso*'—as if he had confessed—and was pronounced guilty of heresy." *Id.* It is interesting that Ashton was willing to take the oath, but unwilling to answer a certain kind of question. It is foolish to read too much into history, but Ashton's action suggests the possibility that the antecedents of the protection against compulsory self-incrimination include more than an aversion to taking an oath. This may be a relevant datum when we later ask whether the privilege should be viewed as a protection only against those who have the authority to administer oaths or whether it should also be viewed as a protection against the police. *See infra* Part V.

⁵⁶ *De Haeretico Comburendo*, 1401, 2 Hen. 4, ch. 15 (Eng.); 2 STAT. AT LARGE (Eng.) 415 (Danby Pickering ed., 1762).

⁵⁷ *Id.*

⁵⁸ LEVY, *supra* note 13, at 59.

⁵⁹ *Id.* at 58–61. The story is also told in abbreviated form in 8 WIGMORE, *supra* note 3, § 2250, at 277.

Latin expression of that maxim, *Nemo tenetur prodere seipsum*.”⁶⁰ As the records of the proceeding indicate, however, Lambert’s complaint was quite narrow. He asserted no absolute right to silence. Rather, his point was that he could not be made to answer on oath until he had been formally accused and given notice of the charges.⁶¹ Even this narrow claim added a nail to Lambert’s coffin, and he was eventually executed for obdurate heresy.⁶²

We do not know the source from which Lambert drew his claim, but it seems within the realm of reasonable conjecture that Lambert, who was a priest, might have been aware of several fragments of opposition to an oath. One of these was an ancient objection within canon law which some had made to the use of the oath as a “fishing expedition” in lieu of other proof.⁶³ Another was the statute *Articuli Cleri* which, two hundred years earlier, had sought to impede the oath.⁶⁴ In addition, there was a much more recent objection by William Tyndale, who was the first person to translate the New Testament into English. Tyndale’s objection was based on the same words of Christ that Walter Brute had cited almost 140 years earlier.⁶⁵

John Lambert’s was not the only voice against the oath. In 1532 and again a year later, a noted lawyer, Christopher St. Germain, attacked the oath on the ground that it was inconsistent with accusatorial procedure.⁶⁶ Also in 1532, Parliament made a similar complaint in a petition to Henry VIII.⁶⁷ For reasons that probably had nothing to do with the merits of the complaint, Henry was sympathetic. For over five years, Henry had unsuccessfully sought to dissolve his marriage to Catherine of Aragon. In 1532, Henry’s chief adviser, Thomas Cromwell, proposed that the “English Church should separate from Rome, becoming effectively a spiritual department of state under the rule of the king

⁶⁰ LEVY, *supra* note 13, at 3, 62.

⁶¹ *Id.* at 4, 62.

⁶² *Id.* at 3.

⁶³ See Silving, *supra* note 38, at 1346. Dean Wigmore asserted that “[t]he fact is that the maxim *nemo tenetur* was an old and established one in ecclesiastical practice.” John H. Wigmore, *Nemo tenetur Seipsum Prodere*, 5 HARV. L. REV. 71, 83 (1891). However, other scholars say that the origin of the maxim is unclear and that there is no early canon-law text containing the maxim. Edward S. Corwin, *The Supreme Court’s Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 3–4 (1930). Even viewed as an objection to “fishing” in lieu of other proof, the meaning of the maxim is not clear: assuming that a proper foundation of “other proof” has been established, what may the accused be compelled to do? Wigmore’s answer is that the accused may be compelled to answer questions under oath. Wigmore, *supra*. Silving’s answer is that the accused was permitted (not compelled) to take an oath of compurgation which would clear him. Silving, *supra* note 38, at 1366–68.

⁶⁴ See *supra* notes 43–45 and accompanying text.

⁶⁵ LEVY, *supra* note 13, at 62–64.

⁶⁶ *Id.* at 64–66.

⁶⁷ *Id.* at 66–67.

as God's deputy on earth."⁶⁸ Henry's acceptance of the proposal gave him the power to terminate his own marriage, and, in 1533, he married Anne Boleyn.⁶⁹ In the same year, he approved Parliament's petition, and Parliament responded by enacting a statute that repealed *De Haeretico Comburendo*.⁷⁰ The new statute provided that "[a]ny person presented or indicted of any heresy, or duly accused by two lawful witnesses, may be cited, arrested, or taken by an ordinary [a church official who sat in ecclesiastical court], or other of the King's subjects to answer in open court." By requiring presentment, indictment, or accusation by two lawful witnesses, the statute responded to contemporary criticism of the oath as a "fishing" device. It did not abolish the oath; rather, it provided for formal charge as a precursor to the oath in ecclesiastical courts.

Henry's break with Rome put him on the horns of a dilemma. One horn was that he incurred the enmity and resistance of those who opposed the break. The other was that Henry, who remained firmly attached to Catholic doctrine (except papal supremacy), inadvertently encouraged the burgeoning Protestant movement. Henry protected both of his flanks with a bloody vengeance that did not always comport with the statute of 1533.⁷¹ Indeed, after Henry became "head of both church and state, heresy became identified with treason. The *ex officio* oath became the major fact-finding tool of a new group of courts, the [royal] prerogative or 'conciliar' courts [deriving from the King's Council]."⁷² Several of the conciliar courts antedated the Tudors. One was the Court of Star Chamber.⁷³ The battle against even a "fishing" oath was far from won.

Henry's successor, Edward VI, was a Protestant who did not pursue his religious enemies with zeal. His reign therefore contributed little to the fight against the oath and nothing to the development of the right against self-incrimination.⁷⁴

2. Admissibility of Confessions

Edward's reign did contribute a morsel to the evidentiary rule (which developed much later)⁷⁵ barring the admissibility of involuntary confessions. During Edward's reign, as before and after, torture was sometimes used to

⁶⁸ 5 ENCYCLOPEDIA BRITANNICA 841 (15th ed. 1986).

⁶⁹ *Id.*

⁷⁰ A Repeal of the Statute of 2 H.4 c. 15 and a Confirmation of the Statutes of 5 R.2 St.2 C.5 and 2 H.5 St.1 C.7 touching the Punishment of Hereticks, 1533, 25 Hen. 8, ch. 14 (Eng.); 4 STAT. AT LARGE (Eng.) 278-79 (Danby Pickering ed., 1763).

⁷¹ LEVY, *supra* note 13, at 69-72.

⁷² Alford, *supra* note 14, at 1623.

⁷³ *Id.*

⁷⁴ LEVY, *supra* note 13, at 73-75.

⁷⁵ See *infra* notes 256-96 and accompanying text.

obtain information, particularly in cases of state significance,⁷⁶ of which treason was a paradigm. In 1547, a statute was enacted repealing earlier laws relating to treason.⁷⁷ Section 22 of the statute provided that no person "shall be indicted, arraigned, condemned or convicted" for treason unless he be "accused by two sufficient and lawful witnesses, or shall willingly without violence confess the same." This statute did not deal with the admissibility of evidence and thus was not a strand in the immediate development of the involuntary confession rule. Nonetheless, it was an antecedent. In fashioning a confessional substitute for the two-witness rule, the drafters required that the confession be voluntary. Why? The answer must be that they regarded a voluntary confession as the functional equivalent of the two-witness requirement. Since the two-witness rule was intended to advance an interest in reliability,⁷⁸ the same function may therefore be attributed to the statutory requirement of voluntariness. As we shall see, this function also underlies the rule that treats involuntary confessions as inadmissible.⁷⁹ Hence, the Edwardian statute may be regarded as a collateral antecedent of the involuntary confession rule.⁸⁰

It is a fair summary of this part of our story to say that, during the period 1368-1553, there was a fitfully recognized aversion to a "fishing" oath in ecclesiastical proceedings, but neither in the ecclesiastical courts nor in the lay courts was there any doctrine opposing compulsory self-incrimination per se or making involuntary confessions inadmissible.⁸¹

⁷⁶ See *infra* note 130.

⁷⁷ An Act for the Repeal of Certain Statutes Concerning Treasons and Felonies, 1547, 1 Edw. 6, ch. 12 (Eng.); 5 STAT. AT LARGE (Eng.) 259 (Danby Pickering ed., 1763).

⁷⁸ 7 JOHN H. WIGMORE, EVIDENCE § 2037, at 353 (Chadbourn rev. 1978) (citing 3 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 358 (Dublin, John Exshaw, 4th ed. 1770)).

⁷⁹ See *infra* note 295 and accompanying text.

⁸⁰ There is a dispute as to whether the word "confess" in the Edwardian statute refers only to a plea of guilty, or whether it includes an extrajudicial confession. See 3 JOHN H. WIGMORE, EVIDENCE § 818 (Chadbourn rev. 1970) [hereinafter 3 WIGMORE]. That dispute is irrelevant for present purposes. In either event, the statute did not deal with admissibility, as does the involuntary confession rule, and, in either event, there was a concern for reliability which foreshadowed the involuntary confession rule.

⁸¹ See 5 W.S. HOLDSWORTH, HISTORY OF ENGLISH LAW 193-94 (1927); JAMES F. STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 30-37 (London, MacMillan, 2d ed. 1890) [hereinafter STEPHEN, GENERAL VIEW]; 1 JAMES F. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 216-21 (London, MacMillan 1883) [hereinafter 1 STEPHEN, HISTORY]; 3 WIGMORE, *supra* note 80, §§ 817-18, at 291-94 (confessions); 8 WIGMORE *supra* note 3, § 2250, at 284-85 (compulsory self-incrimination).

D. Mary I and Elizabeth I: 1553-1603

1. Compelled Self-Incrimination

The throne returned to Catholicism when Mary succeeded Edward, and Mary set about to earn her sanguinary sobriquet. She disavowed the statute of 1533 and revived *De Haeretico Comburendo*. She continued the practice of Henry and Edward by constituting a commission to deal with religious matters. But in Mary's reign, the commission (which eventually became the Court of High Commission), regularly exercised judicial jurisdiction, and Mary conferred on it the authority to use the oath *ex officio* and to imprison recalcitrants.⁸² The resulting inquisition produced "the first widespread attempt" to refuse to answer questions.⁸³ Some people simply refused without giving reasons. Others objected to "fishing" inquiries. Still others refused to answer on the then-novel ground that their answers would be incriminating. These may be the first recorded assertions of a general freedom from compulsory self-incrimination, but the matter is not clear. Regardless of the ground, however, refusals availed naught. There was a bloodbath. "Some were burned on suspicion alone, merely for refusing the oath *ex officio*."⁸⁴

With Elizabeth's ascension in 1558, the English Church became doctrinally Protestant, but remained Catholic in organization and ceremony. Elizabeth's Religious Settlement of 1559 enforced Protestantism by law, but was relatively tolerant of Catholicism. Yet, somewhat like her father, Elizabeth was caught in a trap. On the one hand, English Catholics rued the doctrinal break from Rome. On the other, the Puritans decried the influence of Catholicism in organization and ritual. Each of these contending forces was to contribute to the development of the protection against compulsory self-incrimination.⁸⁵

Elizabeth's concern was initially directed at her Catholic opponents. In 1569-70, pro-Catholic earls rebelled and were defeated. In 1570, Pope Pius V

⁸² LEVY, *supra* note 13, at 75-77.

⁸³ *Id.* at 77.

⁸⁴ *Id.* Professor Levy's principal source was JOHN FOXE, *THE ACTS AND MONUMENTS OF JOHN FOXE: A NEW AND COMPLETE EDITION* (London, R.R. Seeley and W. Burnside, Stephen Reed Cattle ed., 1841). Originally published in 1563, the book contains excerpts of heresy trials based on "the prisoners' own accounts." LEVY, *supra* note 13, at 80. A review of the materials cited by Professor Levy discloses scant reference to the oath *ex officio*. Rather, the Protestant recalcitrants objected to fishing expeditions or to being compelled to incriminate themselves in matters of conscience. *See* 6 FOXE, *supra*, at 625-28; 7 *id.* at 290-315. That the focus of objection in this forerunner of the protection against compulsory self-incrimination was not the oath *itself* detracts from Wigmore's argument that the protection should be limited to situations in which an interrogator has the authority to administer an oath. *See generally infra* Part V.

⁸⁵ LEVY, *supra* note 13, at 84-85. *See also* MARK L. BERGER, *TAKING THE FIFTH* 9-13 (1980).

excommunicated Elizabeth and her adherents, and released her subjects from allegiance to her. His action brought all English Catholics under a cloud of suspicion as potential traitors. A year later, the authorities discovered a Catholic plot to overthrow Elizabeth in favor of Mary Stuart. In 1580, Pope Gregory XIII declared that it would not be a sin to kill Elizabeth. All of these actions produced reactions against Catholics. Between 1575 and 1585, but primarily in the later years, 117 priests and 64 laypersons were tried and executed for treasonously adhering to Rome.⁸⁶

As Elizabeth gradually repressed the internal and external threat of Catholicism, she turned her attention to the Puritans. Her engine was John Whitgift, whom she appointed Archbishop of Canterbury in 1583. His engines, already in existence and primed by past use, were the Court of High Commission and the oath *ex officio*.⁸⁷ The contributions of Elizabeth's reign to the protection against compulsory self-incrimination can be seen in a selection of cases and other events. Some involved Catholics, some, Puritans. Some occurred in prerogative courts, some in common law courts.

In 1568, the Court of High Commission inquired into whether Thomas Leigh, lawyer and devout Catholic, had attended a mass in the Spanish Ambassador's house. Elizabeth, backed by Parliament, had specifically conferred the power to administer the oath *ex officio*. Nevertheless, Leigh, for unstated reasons, refused to take the oath and answer questions. Jailed for contempt, he was subsequently released on habeas corpus by the Court of Common Pleas, a common law court. Later reports of the unpublished opinion, based on Chief Justice Dyer's unpublished records, state that the Court of Common Pleas held that the High Commission "ought not in such cases to examine upon his oath," for "*nemo tenetur seipsum prodere*."⁸⁸ The meaning of the case is uncertain. One cannot tell whether the court was saying that the High Commission had violated *ecclesiastical* rules for the administration of the oath, or whether the court was going beyond that by saying that the High Commission was bound to, but did not, follow *common law* rules for preferring charges.⁸⁹ However, three things are clear. The first is that Common Pleas could not have been endorsing any general freedom from compulsory self-incrimination, for no such freedom existed in any English court in 1568. The second is that the case is the first reported instance in which

⁸⁶ LEVY, *supra* note 13, at 87-92. See also 18 ENCYCLOPEDIA BRITANNICA 343-46 (15th ed. 1986).

⁸⁷ See generally LEVY, *supra* note 13, at 109-204.

⁸⁸ See *Burrowes v. High Comm'n*, 3 Bulst. 48, 81 Eng. Rep. 42 (C.P. 1616). This case is also discussed at: *Of Oaths Before an Ecclesiastical Judge ex officio*, 12 Co. Rep. 26, 77 Eng. Rep. 1308 (K.B. 1655) and 2 Brownl. 271, 123 Eng. Rep. 937 (C.P. 1609); all are referred to in LEVY, *supra* note 13, at 95-96.

⁸⁹ Dean Wigmore prefers the former interpretation. 8 WIGMORE, *supra* note 3, § 2250, at 287 n.90. Professor Levy prefers the latter. LEVY, *supra* note 13, at 97.

a common law court even uttered the Latin maxim. The third, and most important, is that a common law court was willing to enforce its understanding of the maxim at the expense of a prerogative court and risk incurring the displeasure of the Queen herself.⁹⁰

A year later, other lawyers were summoned before the High Commission. It is not known whether the oath was administered. One refused to answer a particular question, saying, "he beleveth he is not bound by Lawe to answer to the same, bycause there is a penall Lawe, for offendinge in matters concernyd in this Interr."⁹¹ This may be the first recorded objection to self-incrimination outside the context of an oath, but again the matter is not clear.⁹²

In 1580, Father Edmund Campion, a Jesuit priest, said under torture that he had been harbored by Thomas Tresham and other nobles. Those he accused were brought before the Court of Star Chamber for examination under oath. They refused to take the oath, were jailed, and later were tried for their refusal. Lord William Vaux defended his refusal by invoking conscience. Sir Thomas Tresham took a different tack, saying that self-accusation was "contrary to the law of nature *seipsum prodere*."⁹³ Although the court found all defendants guilty, four of the judges, including three common law judges, were constrained to reply to Tresham's defense. Going far beyond earlier attacks on compulsory self-incrimination (perhaps "discovering" a rule to fit the occasion, as common law courts did), they said that self-incrimination under compulsion of an oath was impermissible if life or limb was in the balance. However, since the Court of Star Chamber lacked the authority to impose a punishment of death or dismemberment, it could impose a lesser punishment on those who refused to incriminate themselves. Although the *nemo tenetur* principle thus had no effect in Star Chamber proceedings, a seed had been planted by some judges for future harvest in common law proceedings on capital charges of felony or treason.⁹⁴

By 1584, the Court of High Commission, now under the stewardship of Archbishop Whitgift, turned its attention to the Puritans who believed, as resolutely as Catholics, that the Crown should be subservient to the church.⁹⁵ Whitgift was relentless, and the next decade saw a number of attacks on the

⁹⁰ LEVY, *supra* note 13, at 96-97.

⁹¹ *Id.* at 97.

⁹² Professor Levy states, "The record does not reveal that the commissioners required any of the fourteen lawyers whom they examined to take the oath." *Id.* If the oath was not administered, this episode may be another bit of evidence that the antecedents of the protection against compulsory self-incrimination include more than an aversion to taking an oath.

⁹³ SOCIETY OF ANTIQUARIES OF LONDON, *ARCHAEOLOGIA, OR MISCELLANEOUS TRACTS RELATING TO ANTIQUITY* 80-110 (London 1844), *cited in* LEVY, *supra* note 13, at 100-03. The quotation is from page 103.

⁹⁴ LEVY, *supra* note 13, at 105-07.

⁹⁵ *Id.* at 117.

oath *ex officio*. Although these attacks were largely unsuccessful, they too were seeds which came to fruition half a century later.

In 1584, Puritans Wiggenton and Blake refused to answer the questions of the High Commission. Wiggenton complained, as had Lambert in 1532, that he had not received a copy of the charges or the names of his accusers. Blake complained more generally about compulsory self-incrimination. Their complaints were, of course, rejected.⁹⁶

Having no success with the High Commission, the Puritans petitioned Parliament for protection, complaining about the use of an oath without formal accusation. The House of Commons, which feared a Catholic conspiracy to kill Elizabeth, was favorably disposed toward the Puritans and sent the petition to a special committee. The committee then drafted and sent to the House of Lords its own petition asking that the ecclesiastical courts and High Commission abandon the oath. The bishops, including Whitgift, rejected the petition, and Elizabeth asked Commons to drop the matter. Commons was not amused, and one of its leaders, Beale, attacked the oath. One of his complaints was the absence of a formal charge. Another complaint was that members of the Puritan clergy were being required to accuse themselves in "indifferent" matters. By "indifferent," he meant matters of individual conscience that should not be mandated by law and about which the state should be indifferent. In today's terms, Beale was asserting against the oath a substantive interest in both free exercise and non-establishment of religion.⁹⁷

Buoyed by Elizabeth's support, Whitgift and the High Commission ran wild, and "[n]early every case resulted in bitter complaints against compulsory self-incrimination."⁹⁸ These complaints were no more successful than earlier ones, and recalcitrants were jailed by the High Commission for refusing to take an oath. Hence, notwithstanding earlier "seeds," the High Commission refused to recognize a right of silence on any ground.

In 1587, Whitgift discovered a group of Puritan separatists who rejected the prevailing wisdom of a uniform national church. A separatist leader, Henry Barrow, refused to take the oath in the High Commission until he knew the charges. Informed of the charges, he then insisted that witnesses be produced against him. He was jailed for refusing to take the oath.⁹⁹

About a year later, Robert Beale, who earlier had publicly attacked the oath in Commons,¹⁰⁰ wrote a private memorandum attacking the oath as contrary to Magna Carta. Although his argument was historically incorrect,¹⁰¹ it became yet another precedent in the battle against the oath.

⁹⁶ *Id.* at 142-43.

⁹⁷ *Id.* at 140, 141, 143-46.

⁹⁸ *Id.* at 149.

⁹⁹ *Id.* at 152-59.

¹⁰⁰ See *supra* text accompanying note 97.

¹⁰¹ See *supra* text accompanying notes 20-27.

In 1588, certain Puritan tracts appeared on the scene. Hard-hitting, easy to read, pseudonymously written (the author, whose identity was never discovered, called himself "Martin Marprelate"), the tracts were regarded as seditious. The government began a "search and destroy" mission which resulted in numerous arrests and High Commission examinations. Wiggenton, again in trouble, refused to answer on the usual grounds, but also on the broader ground that, "I account it as unnaturall a thing for me to answer against my selfe, as to thrust a knife into my thigh." Others also relied on the broader ground.¹⁰²

In 1590, John Udall was arrested in connection with the Martin Marprelate tracts and was brought (apparently for a preliminary examination) before a special commission that was assisting the Privy Council. He denied being Martin Marprelate, but, relying on the last of the "Magna Carta statutes,"¹⁰³ claimed a legal right not to say whether he had written other books. His inquisitor, Edmond Anderson, Chief Justice of the Court of Common Pleas, said, "[t]hat is true, if it concerned the loss of your life,"¹⁰⁴ thus giving currency to the similar statement made a decade earlier by four judges in Tresham's case.¹⁰⁵ Anderson's statement was put to the ultimate test when Udall was brought to trial six months later.¹⁰⁶ He was tried not before the High Commission, but in a common law proceeding for the felony (capitally punished, of course) of seditious libel. Although defendants in common law proceedings of that time were never heard under oath,¹⁰⁷ the court urged Udall to take an oath and be examined about authorship. Udall refused to take an oath and also refused to give unsworn information.¹⁰⁸ He reminded the court of Chief Justice Anderson's statement during the preliminary examination. The court's response was: "Though the judges had not then concluded it, yet it was law before, or else it could not so be determined after; the violent course of others since, hath caused your case to be more narrowly sifted."¹⁰⁹ Udall may have been the first person to claim a right of silence in a common law proceeding.¹¹⁰ For his pains, his silence was called to the jury's attention by

¹⁰² LEVY, *supra* note 13, at 158-59, 162-63. The quoted words are at 159.

¹⁰³ See *supra* text accompanying notes 46-49.

¹⁰⁴ LEVY, *supra* note 13, at 164. Udall's preliminary examination is "reported" in 1 Cobbett's State Trials 1271-77 (1590). The report was written by Udall himself.

¹⁰⁵ See *supra* text accompanying notes 93-94. One of the four judges was Anderson's predecessor, Chief Justice James Dyer. LEVY, *supra* note 13, at 105.

¹⁰⁶ The trial is reported in 1 Cobbett's State Trials 1277-1306 (1590).

¹⁰⁷ LEVY, *supra* note 13, at 283-84; see also 2 JOHN H. WIGMORE, EVIDENCE § 575, at 806-07, 809 (Chadbourn rev. 1979).

¹⁰⁸ 1 Cobbett's State Trials 1282 (1590).

¹⁰⁹ *Id.* at 1289.

¹¹⁰ LEVY, *supra* note 13, at 168.

the judge as evidence of guilt, and he was convicted.¹¹¹ Sentenced to the gallows, he died in prison.¹¹²

In 1590, Thomas Cartwright, one of the architects of Puritanism, was arrested and brought before the High Commission. He refused to take the oath without knowing the charges. After he was informed of the charges, he still refused. He was then given a set of charges to be answered by him privately in his cell. He was willing to deny some under oath, but refused to respond to others. Consequently, he remained in jail where he and fellow prisoners wrote two tracts attacking the oath *ex officio*. One tract, essentially religious, dealt with the sacredness of an oath. The second tract attacked the oath on many fronts: (1) it was worse than a compurgation oath because it did not end the matter; (2) an oath to answer all questions was simply too broad; (3) accusations should be proved by witnesses rather than by going through secrets of the heart which should be private until discovered by God (might we call this an interest in mental privacy?); (4) the oath resulted in people becoming informers, thus destroying relationships in both church and family; and (5) the use of oaths in ecclesiastical cases in prerogative courts would become a slippery slope leading to the use of an oath in purely penal matters in violation of the early writ of Henry III limiting the oath to matrimonial and testamentary cases.¹¹³ Ultimately, Cartwright and his fellow prisoners relied on freedom of belief or conscience, and that argument and Beale's Magna Carta argument became the twin pillars of Puritan resistance to the oath.

Although the High Commission sent Cartwright to jail for not taking the oath, it apparently had no "hard" evidence against him. As a result, Cartwright's refusal to confess blocked further proceedings. In frustration, the High Commission recommended, and the Privy Council ordered, that Cartwright be tried in Star Chamber where he would have the procedural protections of definite charges and known accusers.¹¹⁴ It was hoped that Cartwright would then answer questions under oath. The Star Chamber proceeding was held, but Cartwright refused to take the oath notwithstanding procedural protections. The evidence against him was inconclusive and he was eventually released.¹¹⁵ Cartwright had beaten the system by asserting a right to silence that seems identical to today's understanding of the right.

James Morice was a Puritan lawyer who wrote a book in the early 1590s attacking the High Commission and the oath *ex officio*. He gave further

¹¹¹ 1 Cobbett's State Trials 1282, 1290 (1590).

¹¹² LEVY, *supra* note 13, at 169-70. That Udall refused to give unsworn information demonstrates that the real objection was not to the oath but to the inquiry itself. Indeed, in reading the stories of Wiggenton, Blake, Beale and others, one is forced to conclude that objecting to an oath was merely an indirect way of avoiding an opprobrious interrogation.

¹¹³ *Id.* at 174-78. The writ of Henry III is discussed *supra* note 40.

¹¹⁴ LEVY, *supra* note 13, at 179, 181, 183.

¹¹⁵ *Id.* at 186-88.

expression to the erroneous argument that the *nemo tenetur* doctrine was a creature of Magna Carta, and claimed that a compulsory oath was contrary to the common law. He continued his attack in 1593 by introducing a bill in Commons against the oath, assailing it on the specific ground that it compelled self-incrimination. Elizabeth was miffed and remonstrated with the Speaker of Commons, Sir Edward Coke. The Privy Council placed Morice under a form of house arrest. Morice lost the contest with the Crown, but succeeded in planting yet another seed.¹¹⁶

Elizabeth's victory resulted in the 1593 enactment of repressive legislation against both Catholics and Puritan separatists. The anti-Catholic legislation required those suspected of being Catholic priests either to answer questions under oath or to be jailed for refusal. The last decade of Elizabeth's reign was not significant.¹¹⁷

The cases discussed above, with the exception of John Udall's, occurred in prerogative courts. They show that during the reigns of Mary and Elizabeth there were increasing objections to the use of the oath. The objections were numerous. Some objectors merely repeated the past by asserting that an oath was improper until the suspect had been informed of the charges and the accusers. Others tracked new ground by demanding that the accusers be produced in court. Still others made it clear that they would not take an oath even if the accusers were produced. Some of these objectors relied on an interest in freedom of religion. Others asserted potentially far-reaching arguments that struck at the very heart of compulsory self-incrimination: that government should not intrude into the recesses of mind and heart (a privacy concern), and that self-accusation was as unnatural as self-wounding (a dignity concern).

The prerogative courts consistently rejected these arguments and punished their authors. As Leigh's case demonstrates, however, the common law courts were sometimes more sympathetic and occasionally used the writ of *habeas corpus* to release someone who had been jailed by a prerogative court for refusing to take the oath. The story of this period would therefore be incomplete if we did not ask what was happening in the common law courts. The answer to this question involves the preliminary examination and trial in criminal cases; it also involves certain civil proceedings.

Insofar as criminal cases are concerned, two important events occurred during Mary's reign. The events were unrelated to the inquisition, but bear on the general matter of interrogation. In 1554, a statute was enacted that restricted the authority of justices of the peace to release suspects on bail. The statute provided that, before releasing a felony or manslaughter suspect on bail, the justices

¹¹⁶ *Id.* at 193–200.

¹¹⁷ *Id.* at 202–03.

shall take the examination of the said prisoner, and information of them that bring him, of the fact and circumstances thereof, and the same, or so much thereof as shall be material to prove the felony shall be put in writing before they make the same bailment; which said examination, together with the said bailment, the said justices shall certify at the next general gaol-delivery¹¹⁸

A year later, Parliament enacted a companion statute which asserted that an examination of the prisoner was even more necessary if the justices were going to commit the prisoner. Consequently, the justices were directed to examine the prisoner and witnesses and to put the examination in writing within two days.¹¹⁹

In his fascinating study of renaissance criminal procedure, Professor John Langbein advances and masterfully defends the thesis "that the Marian statutes represent the decisive step in the crystallization of the public prosecutorial function for cases of serious crime and its allocation to the justices of the peace."¹²⁰ He states that "[t]he most fundamental, and worst articulated, goal was to induce the JP to take an active role in the investigation of serious crime in cases which required it,"¹²¹ much like today's detective does.¹²² Although an effort was probably made to examine the accused, his confession was not essential in the English scheme of proof.¹²³ The accused was not examined under oath.¹²⁴ It is not clear whether the administration of an oath to the accused was regarded as incompatible with a slowly emerging right of silence,

¹¹⁸ An Act Touching Bailment of Persons, 1554, 1 & 2 Phil. & M., ch. 13 (Eng.); 6 STAT. AT LARGE (Eng.) 57, 58 § 4 (Danby Pickering ed., 1763).

¹¹⁹ An Act to Take Examination of Persons Suspected of any Manslaughter or Felony, 1555, 2 & 3 Phil. & M., ch. 10 (Eng.); 6 STAT. AT LARGE (Eng.) 74 (Danby Pickering ed., 1763). The Marian statutes were repealed in 1848 by Sir John Jervis's Act, 1848, 11 & 12 Vict., ch. 42, § 18 (Eng.); 88 STAT. AT LARGE (Eng.) 204, 215. Jervis's Act is discussed in 1 STEPHEN, HISTORY *supra* note 81, at 220, 441.

¹²⁰ JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE 34 (1974) [hereinafter LANGBEIN, RENAISSANCE].

¹²¹ *Id.* at 35.

¹²² For a discussion of the history of the Marian statutes and a confirmation of the detective-like role of the justice, see 1 STEPHEN, HISTORY, *supra* note 81, at 219-25, 325 ff., 376-77; Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224, 1232-33 (1932); see also LEVY, *supra* note 13, at 325.

¹²³ LANGBEIN, RENAISSANCE, *supra* note 120, at 205.

¹²⁴ MICHAEL DALTON, COUNTRY JUSTICE 273 (P.R. Glazebrook ed., 1973) (1619); LANGBEIN, RENAISSANCE, *supra* note 120, at 11, 17, 25; LEVY, *supra* note 13, at 107, 458 n.33.

as some early commentators asserted,¹²⁵ or was merely believed to be inconsistent with the absence of an oath at trial.¹²⁶

There was no requirement that justices advise suspects of a right of silence or of the consequences of speaking,¹²⁷ and suspects were sometimes induced to confess by the relentless pressure of the examination.¹²⁸ On the other hand, confession was not required, some suspects remained silent, justices did not punish silent suspects by sending them to jail,¹²⁹ and torture was not ordinarily used in criminal cases that lacked state significance.¹³⁰ The "sanctions" for refusal to speak were ordinarily no more than denial of bail¹³¹ or calling the suspect's silence to the attention of the ultimate trier of fact.¹³² As a result, there is no evidence of the sort of resistance to examination under the Marian statutes that one finds associated with the oath *ex officio* in prerogative

¹²⁵ DALTON, *supra* note 124; SIR ANTHONY FITZHERBERT & RICHARD CROMPTON, L'OFFICE ET AUCTORITE DE JUSTICE DE PEACE 128 (P.R. Glazebrook ed., 1972) (1584). This view is accepted by Judge Stephen. See 1 STEPHEN, HISTORY, *supra* note 81, at 440.

¹²⁶ See 2 WIGMORE, *supra* note 107, at 809.

¹²⁷ See 3 WIGMORE, *supra* note 80, § 848, at 510-11; E.M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 14 (1949).

¹²⁸ 1 J. CHITTY, CRIMINAL LAW 73 (London, A.J. Valpy 1816) [hereinafter CHITTY]; LANGBEIN, RENAISSANCE, *supra* note 120, at 51; LEVY, *supra* note 13, at 325; Kauper, *supra* note 122.

¹²⁹ CHITTY, *supra* note 128, at 84-85; LANGBEIN, RENAISSANCE, *supra* note 120, at 48, 52-53. One may infer from Udall's case, see *supra* notes 103-12 and accompanying text, that the suspect's refusal to speak was brought to the attention of the trier of fact. It also seems reasonable to infer, as Professor Langbein does, that "it would have been improper to bail a suspect who refused to attempt to exculpate himself." LANGBEIN, RENAISSANCE, *supra* at 11.

¹³⁰ See generally, DAVID JARDINE, A READING ON THE USE OF TORTURE IN THE CRIMINAL LAW OF ENGLAND (London, Baldwin & Craddock 1837) [hereinafter JARDINE, TORTURE]; LANGBEIN, TORTURE, *supra* note 33 (discussing torture in both Europe and England). Professor Langbein notes that torture in England was "exclusively central business," *id.* at 136, in the sense that only the Privy Council or the Crown had the authority to authorize torture. "[N]o law enforcement officer, no law court acquired the power to use torture without special warrant." *Id.* at 137. Torture was used in felony cases that

did not involve crimes of state. They were hardly ordinary criminal proceedings, however, precisely because the Privy Council did intervene in the investigations. Sometimes the initiative for the use of torture seems to have come from the local law enforcement officers, who procured the Council's warrant. More often it appears that the Council intervened at the behest of some well-placed complainant . . .

Id. See also LANGBEIN, RENAISSANCE, *supra* note 120, at 205-07 & n.155.

¹³¹ LANGBEIN, RENAISSANCE, *supra* note 120, at 11.

¹³² The suspect's silence at trial was called to the jury's attention, see *supra* note 111, and *infra* note 143 and accompanying text, so it seems reasonable to infer that the suspect's pretrial silence was dealt with similarly.

proceedings. Indeed, I have found no reported case during the reigns of Mary and Elizabeth in which the accused asserted the *nemo tenetur* doctrine to fend off a magistrate's examination.

Yet, the examination may have contributed in a small and very indirect way to the eventual recognition by the common law courts of a right of silence. During the reign of Elizabeth, manuals for justices of the peace referred to both the *nemo tenetur* principle and the examination of the accused authorized by the Marian statutes. Sir Anthony Fitzherbert's 1583 manual urged the *nemo tenetur* principle as an explanation for not examining the suspect on oath.¹³³ Five years later, William Lambard, whose manual was quite influential,¹³⁴ put the point differently and with seemingly greater breadth. Referring to the Marian statutes and citing no authority for his position, he said,

Here you may see (if I be not deceived) when the examination of a felon began first to be warranted amongst us. For at the common law, *nemo tenebatur prodere seipsum*, and then his fault was not to be wrung out of himself, but rather to be discovered by other means and men.¹³⁵

This passage is perplexing for several reasons. First, it is not confined to the *bête noire* of examination on oath. Rather, it refers simply to examination. Second, it seems to assert that, by 1554–1555, the years in which the Marian statutes were enacted, the common law already recognized the *nemo tenetur* doctrine. In fact, however, the doctrine was not then recognized by any court. Indeed, the strongest statements of the doctrine by common law judges (those made by Chief Justice Dyer in Thomas Leigh's habeas case in 1568 and by three judges in Thomas Tresham's case in 1580) were decades away. Moreover, the statement in Tresham's case was *obiter dictum*, and the statements in both cases referred to examinations under the oath *ex officio*. If Lambard intended to address unsworn examinations as well as examinations on oath, he went far beyond precedent. If he intended to confine his statement to

¹³³ FITZHERBERT & CROMPTON, *supra* note 125. Fitzherbert did not explicitly use the words "*nemo tenetur*." He did, however, attribute the stricture against on-oath examination to a principle that the law does not intend that a person discredit or accuse himself ("*car le ley intend home ne boile luy mesme discrediter or accuser in tiel case*"). It is not clear why Fitzherbert believed that *nemo tenetur* was offended by examining on oath a suspect who was not punished for refusing to answer. The answer may be that the oath had the practical effect of compelling people to incriminate themselves and that the objection was to the fact of compulsion.

¹³⁴ See STEPHEN, GENERAL VIEW, *supra* note 81, at 36–37.

¹³⁵ 2 WILLIAM LAMBARD, EIRENARCHA, OR OF THE OFFICE OF THE JUSTICES OF THE PEACE 213 (London, R. Newbery 1588) [hereinafter LAMBARD, EIRENARCHA].

on-oath examinations, he attributed to the *nemo tenetur* principle a firmness which it did not really have at the time in any common law court.¹³⁶

These deficiencies notwithstanding, Lambard persuaded others. Professor Levy states that Lambard popularized the *nemo tenetur* maxim "for every petty magistrate and lawyer in England."¹³⁷ A statement similar to Lambard's appears in a 1619 treatise,¹³⁸ Lambard was quoted by Blackstone almost two centuries later,¹³⁹ and a statement virtually identical to Lambard's is in an early nineteenth century work.¹⁴⁰ Consequently, it appears that, rightly or wrongly, Lambard led people to believe that the common law recognized *nemo tenetur* in the middle-to-late 1500s,¹⁴¹ although we cannot tell from Lambard's writing what he believed the doctrine meant.

We move now from the preliminary examination to the trial of criminal cases in the common law courts. The defendant played an active role in his own trial. Although he was unsworn, he replied to the arguments and assertions of the prosecutor and answered the court's questions.¹⁴² He was not forced to answer, but his silence occurred in the jury's presence, and, as Udall's case shows, the judge might tell the jury to infer guilt.¹⁴³ Under these circumstances, it is hard to regard the right of silence as more than a fledgling

¹³⁶ Lambard's statement is perplexing for a third reason. It implies that, but for the Marian statutes, the examination of an unsworn suspect would offend the *nemo tenetur* principle. However, it is far from obvious that *every* unsworn examination of a suspect by a JP would violate *nemo tenetur*. This is particularly so in light of the matters discussed *supra* in the text accompanying notes 105-10. Lambard gives no justification for his contrary implication.

¹³⁷ LEVY, *supra* note 13, at 107.

¹³⁸ DALTON, *supra* note 124, at 273.

¹³⁹ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *296-97 (Philadelphia, Rees Welsh & Co., 1st Am. ed. 1772).

¹⁴⁰ CHITTY, *supra* note 128, at 83-84.

¹⁴¹ Indeed, a statement similar to Lambard's may be found in a late nineteenth century treatise. 1 SIMON GREENLEAF, EVIDENCE § 224, at 364 (Wigmore rev.) (Boston, Little, Brown & Co. 16th ed. 1899). Wigmore, however, claimed that the statement was wrong. *Id.* at n.3.

¹⁴² See generally, 2 THOMAS SMITH, DE REPUBLICA ANGLORUM 100 (L. Alston ed. 1906) (1565); LEVY, *supra* note 13, at 264, 282-84; 1 STEPHEN, HISTORY, *supra* note 81, at 324-31; 8 WIGMORE, *supra* note 3, § 2250, at 286. 1 STEPHEN, HISTORY, *supra* note 81, at 325, discusses state trials rather than ordinary criminal trials, for those are the cases for which reports remain, and the discussions of both Stephen and Levy deal principally with the post-Elizabethan period. Nevertheless, the practice of questioning the accused at his trial was of long duration, and certainly existed during the period in question. Smith, who wrote during the Elizabethan period, characterized an ordinary criminal trial as an "altercation." See also 1 STEPHEN, HISTORY, *supra* note 81, at 349-50. For a very early illustration of questioning the accused, see the Case of William, 4 Selden Society 62 (1891) (reporting a horse-stealing case of the mid-to-late 13th century). Udall's trial, discussed *supra* at text accompanying notes 103-12, is an example from the Elizabethan period.

¹⁴³ 1 Cobbett's State Trials 1271, 1282 (1590).

in criminal trials, if that. On the other hand, it is important to note that during the reigns of Mary and Elizabeth, there was no right to counsel in cases of treason and felony. The right to representation by retained counsel was almost a century away in treason cases, and full participation by counsel in felony trials was not permitted until 1836.¹⁴⁴ As a result, the accused had to represent himself, and his active participation was inevitable. Given the incompatibility of a right of total silence with a duty of self-representation, the fact that the accused was not forced to answer questions may be some evidence that the common law courts were not wholly indifferent to the value of silence.¹⁴⁵

There was also some evidence in civil cases. The release of Leigh on habeas in 1568 has already been noted.¹⁴⁶ In 1590, in the case of *Cullier and Cullier*,¹⁴⁷ the defendant was tried in an ecclesiastical court for fornication. The judge wanted him to answer under oath whether he had committed the offense. Represented by Edward Coke, later to become a major figure in the struggle against compulsory self-incrimination, Cullier sought a writ of prohibition from the Court of Common Pleas. It was granted "because *nemo tenetur prodere seipsum* in such cases of defamation, but only in causes testamentary and matrimonial, where no discredit can be to the party by his oath."¹⁴⁸ The brief opinion does not reveal the precise ground on which Coke attacked the oath or on which the writ was granted. A year later, the Court of Queen's Bench held that an ecclesiastical court had jurisdiction over a layman on a fornication charge and could compel the taking of an oath *ex officio* as long as the offense was first presented by two witnesses.¹⁴⁹ This holding by a common law court apparently accepts compulsory self-incrimination in church courts as long as proper accusatorial procedures are used. Consequently, it is reminiscent of earlier attacks on the oath.¹⁵⁰

¹⁴⁴ See LAWRENCE HERMAN, *THE RIGHT TO COUNSEL IN MISDEMEANOR COURT* 52 (1973).

¹⁴⁵ The dictum of the common law judges in Tresham's case, *supra* text accompanying notes 93-94, is additional evidence. On the other hand, the attempt of a common law judge to bully Udall into taking an oath or answering without an oath demonstrates that the *nemo tenetur* principle had not gained a firm hold in common law proceedings; see *supra* notes 103-08.

¹⁴⁶ See *supra* text accompanying notes 88-89.

¹⁴⁷ 1 Cro. Eliz. 201, 78 Eng. Rep. 457 (C.P. 1590). Other versions of the case are reported in 72 Eng. Rep. 987 (C.P. 1590) and 74 Eng. Rep. 816 (C.P. 1590).

¹⁴⁸ *Id.* The version of the case reprinted in 74 Eng. Rep. 816 (C.P. 1590) states that the request for a writ of prohibition was taken under advisement.

¹⁴⁹ Dr. Hunt's Case, 1 Cro. Eliz. 262, 78 Eng. Rep. 518 (Q.B. 1591). It is of passing interest that the grand jurors were so incensed by Dr. Hunt's attempt to compel an oath that they indicted him; see LEVY, *supra* note 13, at 222.

¹⁵⁰ See, e.g., *supra* notes 96-97 and accompanying text.

I have omitted from the discussion of common law cases certain chancery court decisions that decline to force defendants to reveal self-incriminating information. These decisions are discussed in 8 WIGMORE, *supra* note 3, § 2250, at 288. What these cases

It is hard to know what to make of the common law cases of the Marian and Elizabethan periods. The criminal cases seem to be a wash. On the one hand, the accused was under pressure to speak. On the other, he was not jailed for silence, as he was in the prerogative courts. In civil cases, extraordinary relief was sometimes granted to persons who sought to avoid compulsory self-incrimination in prerogative or ecclesiastical courts, but the opinions are brief and generalization is dangerous. Viewing the matter cautiously, one sees signs, but no firm recognition, of a right to remain silent. Perhaps the strongest sign appears in Lambard's treatise which, rightly or wrongly, insisted that the common law recognized the *nemo tenetur* principle.

2. Admissibility of Confessions

What of the rule that today bars the admissibility of an involuntary confession? Did it exist in any form in the Marian and Elizabethan eras? The answer is that there was no rule barring the admissibility of any confession, but there were some signs of a concern about the reliability of confessional evidence in cases tried during both eras. In the *Duke of Somerset's Trial* for treason,¹⁵¹ the prosecutor, in offering an accomplice's confession into evidence against the defendant, said that the confession had been sworn to "without any kind of compulsion, force, or envy, or displeasure."¹⁵² A similar statement was made about an accomplice's confession in the *Duke of Norfolk's Trial*, which occurred two decades later.¹⁵³ In the *Trial of Sir Christopher Blunt*, the concern was that the defendants' own confessions "came voluntarily . . . no man being racked or tormented."¹⁵⁴ In these cases, however, there is not a hint that voluntariness was a condition of admissibility. Rather, one may infer that the assertion of voluntariness was intended only to bolster the weight of the evidence. Yet, the same concern for reliability later emerged as the cornerstone of the rule that makes involuntary confessions inadmissible.

stand for is not clear. Wigmore, who flatly claims that the right of silence was not recognized in common law courts before the early 1600s, *id.* at 284-85, asserts that these cases merely exemplify the doctrine that equity will not enforce a forfeiture. His discussion of some of the cases, however, is speculative, labored, and unpersuasive. The only thing that can be said with assurance is that none of the cases explicitly relies on the *nemo tenetur* doctrine.

¹⁵¹ 1 Cobbett's State Trials 515 (1551).

¹⁵² *Id.* at 517.

¹⁵³ 1 Cobbett's State Trials 957, 978 (1571).

¹⁵⁴ 1 Cobbett's State Trials 1409, 1419 (1600). This is the earliest English case that I have found referring to the voluntariness of the defendant's own confession. The earliest English reference of any sort is the Edwardian treason statute, discussed *supra* in the text accompanying note 77.

E. *James I: 1603–1625*1. *Compelled Self-Incrimination*

With Elizabeth's death in 1603, the crown passed to James I and the House of Stuart, which, in Professor Neill Alford's colorful phrase, had a "talent for fanning fire from smouldering embers."¹⁵⁵ With no intention of doing so, James, by word and deed, galvanized both parliament and the common law courts into action against the oath *ex officio*, the prerogative and ecclesiastical courts, and even the royal prerogative.¹⁵⁶

At a conference called by him in 1604 to consider a Puritan petition, James supported the use of the oath by ecclesiastical courts if there was suspicion or public fame, and he ridiculed Puritan leaders, thus offending Commons which was sympathetic to Puritan concerns. When he opened Parliament, James demanded religious conformity. He renewed his demand while approving certain recently adopted canons of church governance which retained the oath *ex officio* even though Parliament had specifically objected to the canons on the ground that they were contrary to Magna Carta.¹⁵⁷

Unable to obtain relief from the mandated conformity, Puritans turned to the common law courts for help in resisting the jurisdiction and procedures of the High Commission, including the oath. They found a ready ally, one which had been concerned for three centuries about the existence and scope of ecclesiastical court jurisdiction. As the High Commission gained prominence under Whitgift in Elizabethan England, common law writs in opposition became more frequent. When James ascended to the throne, writs of prohibition increased. In 1606, the High Commission fought back by petitioning the Privy Council for protection. The common law judges responded by saying that the High Commission had to disclose the charges before examining on oath.¹⁵⁸

In 1606, Sir Edward Coke was made Chief Justice of the Court of Common Pleas. He became the very personification of the history and traditions of the court, fanatically devoted to common law processes and hostile to rival systems. In the same year, Coke and his colleagues "resolved," outside the context of any pending litigation, that, in the absence of statutory authorization, the High Commission could not fine or imprison people even if permitted to do so by royal letters patent (the document constituting the High Commission).¹⁵⁹ Commons then launched its own attack by asking the Privy

¹⁵⁵ Alford, *supra* note 14, at 1626.

¹⁵⁶ See generally, LEVY, *supra* note 13, at 205–65.

¹⁵⁷ *Id.* at 210–14.

¹⁵⁸ *Id.* at 216–28.

¹⁵⁹ 12 Co. Rep. 19, 77 Eng. Rep. 1301 (1606). This resolution was based in part on *Simpson's Case* (1599), reported in 4 Co. Inst. 333 (1644), in which the Court of Assizes in

Council to get an advisory opinion on whether an ecclesiastical judge could examine on oath *ex officio*. The answer of Coke and Sir John Popham, who was Chief Justice of King's Bench, was that (1) the ecclesiastical judge had to make known the charges before examining either lay or churchperson; (2) the examiner could inquire into the accused's words or acts, but not thoughts; and (3) no layperson could be examined on oath *ex officio* except in a marital or testamentary matter.¹⁶⁰

However, the common law judges were not yet ready for an all-out struggle with the Crown and High Commission, as was demonstrated in 1607 by Nicholas Fuller's case. Fuller, a lawyer who frequently represented Puritans, sought from King's Bench a writ of habeas corpus to release two clients who had been jailed for refusing to take the oath in High Commission Proceedings. His argument in support of the writ was an intemperate indictment of church, crown, and High Commission. It was also a carefully analyzed attack on the oath, on the authority of the High Commission to administer the oath and to imprison, and on the royal prerogative to confer such authority on the High Commission. In support of his argument, Fuller invoked Magna Carta, centuries of statutes, and the common law of England. For making the argument, Fuller was committed by the High Commission to await trial on many charges, including slander and contempt. Fuller retaliated by obtaining from King's Bench an interlocutory writ of prohibition. After consulting with the other common law judges, including Coke, the judges of King's Bench dissolved the writ, but on narrow grounds. The High Commission was left with authority to try Fuller only for certain relatively minor religious charges. The King's Bench did not address the issue of royal prerogative, thus keeping the issue alive. It also observed that it was not reaching certain "scandals, contempts, and other matters which by the Common law and statutes of our Realm of England should be punished and determined." In this fashion, a common law court claimed for itself the authority to determine the subject-matter jurisdiction of a prerogative court.¹⁶¹

The common law judges continued to issue writs of prohibition, and James summoned them for an explanation. Accounts of the meeting vary. In one oft-told version, Coke claimed that James was "under God and the law," James lost his temper, and Coke abjectly apologized.¹⁶² It was becoming clear that

Northamptonshire held that the High Commission could institute proceedings only by citation, not by arrest warrant. It is clear that the common law judges were trying to interfere with the exercise of High Commission jurisdiction at both the intake and outgo stages.

¹⁶⁰ LEVY, *supra* note 13, at 231.

¹⁶¹ Nicholas Fuller's Case, 12 Co. Rep. 41, 77 Eng. Rep. 1322 (1607), *cited in* LEVY, *supra* note 13, at 232-40. The quotation is from 239.

¹⁶² LEVY, *supra* note 13, at 242-44.

Fuller's case and the writs had drawn into question the absolute authority of the king. The battle against the oath thus assumed a new dimension.

Abjectly apologetic or not, Coke persisted in issuing writs of prohibition against High Commission proceedings. His grounds included the oath *ex officio* which he regarded as contravening the *nemo tenetur* doctrine.¹⁶³ Coke was constantly on the carpet, constantly debating with agents of the crown, and constantly relying on Magna Carta to support his actions. Puritan pamphleteers took up the cause, and Commons presented to James in 1610 a petition of grievances which attacked the High Commission on many fronts, including the oath. The petition praised the issuance of writs of prohibition, and complained that James was attempting to create new crimes by royal proclamation.¹⁶⁴

James asked for an advisory opinion on proclamations from the chief justices of the common law courts. They told him that the "law" of England comprised statutes, common law, and customs, but not royal proclamations. James then stopped using proclamations to create new offenses, but his antagonism toward Coke and his colleagues increased.¹⁶⁵

After various debates in the Privy Council, James promised to issue new letters patent reforming the High Commission. The new letters, however, issued in 1611, repeated the old by continuing the oath *ex officio*, explicitly punishing refusal with jail, and implicitly permitting a conviction for the charged offense. James also appointed Coke and other common law judges to the High Commission, but they refused to serve and continued to issue writs of prohibition, thus encouraging further Puritan resistance.¹⁶⁶

In 1613, James, hoping to neutralize Coke, made him Chief Justice of the Court of King's Bench and appointed him to the Privy Council. Coke continued to vex James and the High Commission by attacking the oath, thus casting doubt on the new letters patent. The basis for his attack was the *nemo tenetur* doctrine.¹⁶⁷ In 1615, Coke and his colleagues decided the case of *Burrowes*,¹⁶⁸ in which a writ of habeas corpus was sought by Puritan

¹⁶³ *Id.* at 244–45. Coke did not oppose the oath in marital or testamentary cases. *Id.* at 245. Coke's reliance on *nemo tenetur* is detailed. *Id.* at 479 n.27. In Wigmore's view, the real objection of the common law judges, including Coke, to the oath was not that it involved compulsory self-incrimination, but that it was being used in cases other than matrimonial and testamentary. 8 WIGMORE, *supra* note 3, § 2250, at 280–81. Some of the cited cases, however, show a broader objection. *See, e.g.,* *Huntley v. Cage*, 2 Brownl. 14, 123 Eng. Rep. 787 (C.P. 1610) (The High Commission "ought not to examine any man upon his oath, to make him to betray himself, and to incur any penalty pecuniary or corporal.").

¹⁶⁴ LEVY, *supra* note 13, at 247–48.

¹⁶⁵ *Id.* at 249.

¹⁶⁶ *Id.* at 249–52.

¹⁶⁷ *Id.* at 252–53.

¹⁶⁸ 3 Bulst. 48, 81 Eng. Rep. 42 (C.P. 1615).

separatists who had been jailed for refusing to take the oath in High Commission proceedings. The petitioners were ultimately denied relief, the confinement being justified on other grounds. However, Coke held that the initial ground for confinement was unacceptable. In the first place, the accused were entitled to a copy of the charges. As a second and independent objection, the accused could not be compelled to take a self-incriminatory oath.¹⁶⁹

Coke's judicial days were numbered. In 1616, James dismissed him as Chief Justice. For the next seventeen years, there was no ferment regarding the oath, and no writs of prohibition were grounded on the oath.¹⁷⁰ "Yet Coke, along with common law judges and members of Parliament, as well as the Puritan victims of the High Commission, had contributed to the greater acceptance of the Latin maxim *nemo tenetur seipsum prodere*, that no one was bound to accuse himself."¹⁷¹

The "greater acceptance" was, however, far from total. In the Court of Star Chamber (also a prerogative court, but not an ecclesiastical court) the oath *ex officio* was frequently used even in cases in which Coke sat.¹⁷² The accused, however, was given notice of the charges, and could refuse to answer in capital cases.¹⁷³

In common law proceedings, past practices were continued. The magistrate's preliminary examination of the accused occurred as it had before,¹⁷⁴ and the trial remained an altercation between accused and accuser in which the accused was "pressed and bullied to answer."¹⁷⁵ The standard sources disclose no case in which an accused even tried to invoke the *nemo tenetur* maxim to resist a preliminary or trial examination. Consequently, there is no case addressing the question of whether *nemo tenetur* was regarded as applicable to such proceedings.

Yet there was at least one sign that *nemo tenetur* was taking hold outside the contest between the High Commission and the extraordinary writ. In 1620, a committee of the House of Lords inquired into various corrupt acts alleged

¹⁶⁹ *Burrowes* is discussed in LEVY, *supra* note 13, at 254-56. Wigmore's discussion is at 8 WIGMORE, *supra* note 3, § 2250, at 280. Wigmore asserts that Coke's real objection was that a layperson had been charged *ex officio* in a cause that was neither marital nor testamentary. Although Coke's opinion is not crystal clear, it supports a broader interpretation than Wigmore's.

¹⁷⁰ LEVY, *supra* note 13, at 257, 260.

¹⁷¹ MARK L. BERGER, *TAKING THE FIFTH* 14 (1980).

¹⁷² 8 WIGMORE, *supra* note 3, § 2250, at 281-82.

¹⁷³ LEVY, *supra* note 13, at 257.

¹⁷⁴ 1 STEPHEN, *HISTORY*, *supra* note 81, at 350.

¹⁷⁵ 8 WIGMORE, *supra* note 3, § 2250, at 286; *see also* 1 STEPHEN, *HISTORY*, *supra* note 81, at 332-37, and the cases cited therein which leave no doubt that the trial was an altercation in which the accused played an active role. In some of these cases, Coke himself played a role that was far from benign. *Id.* at 332, 333.

against Sir Giles Mompesson. Functioning as would an examining magistrate, the committee questioned co-conspirators and victims. Reporting its activities to Commons, the committee said that it had "urged none to accuse himself, and admonished every man not to accuse another out of passion."¹⁷⁶ Professor Levy sees this statement as evidence that the *nemo tenetur* doctrine was beginning to express an aversion to compulsory self-incrimination per se, not just to incrimination under compulsion of an oath.¹⁷⁷

2. Admissibility of Confessions

Insofar as the involuntary confession rule is concerned, the Jacobean era was similar to the Edwardian, Marian, and Elizabethan. There was certainly no rule in any court that an involuntary confession was inadmissible.¹⁷⁸ However, we may presume a continuation of the emerging doctrine of the Marian and Elizabethan eras that an involuntary confession was entitled to less weight.¹⁷⁹ Moreover, the concern reflected in the Edwardian statute that a plea of guilty (or, perhaps, any confession) to treason be voluntary¹⁸⁰ was voiced in broader terms during the reign of James. In *Les Pleees del Corone*, an important treatise of the time,¹⁸¹ William Staundiford addressed the general subject of guilty pleas:

If one is indicted or appealed of felony, and on his arraignment he confesses it, this is the best and surest answer that can be in our law for quieting the conscience of the judge and for making it a good and firm condemnation; provided, however, that the said confession did not proceed from fear, menace, or duress; which if it was the case, and the judge has become aware of it, he ought not to receive or record this confession, but cause him to plead not guilty and take an inquest to try the matter.¹⁸²

¹⁷⁶ Proceedings against Sir Giles Mompesson, 2 Cobbett's State Trials 1119, 1123 (1620).

¹⁷⁷ LEVY, *supra* note 13, at 263. Wigmore views the statement as evidence that the *nemo tenetur* doctrine was beginning to take hold in common law proceedings. 8 WIGMORE, *supra* note 3, § 2250, at 289. At the same time, and without any explanation or citation, he says that Parliament was probably following ecclesiastical rules. *Id.* at 289 n.97.

¹⁷⁸ 3 WIGMORE, *supra* note 80, § 817, at 291-94. A treatise of the era, written for justices of the peace, makes no mention of any rule that a confession is inadmissible if involuntary. DALTON, *supra* note 124.

¹⁷⁹ See 8 WIGMORE, *supra* note 3, § 819, at 296 n.1.

¹⁸⁰ See *supra* note 77 and accompanying text.

¹⁸¹ See STEPHEN, GENERAL VIEW, *supra* note 81, at 36.

¹⁸² 2 WILLIAM STAUNDIFORD, LES PLEES DEL CORONE, 142-43 (London, Ex Typographia Societatis Stationari 1607).

This passage is significant for three reasons. First, Staundiford was addressing all felonies, not just the offense of treason. Second, he was concerned with the acceptability or admissibility of a plea of guilty, not just with whether the plea might displace some special rule of proof such as the two-witness requirement in treason cases. Third, the obvious implication of the passage is that an involuntary guilty plea is unreliable. All of this links Staundiford to the involuntary confession rule. That rule, which was articulated much later, is concerned with the exclusion of putatively unreliable confessions.¹⁸³

F. England 1625–1700

1. *Compelled Self-Incrimination*

Charles I became king in 1625. He and his Archbishop of Canterbury, William Laud, pursued Puritans with renewed vigor, energizing the High Commission into ubiquitous action.¹⁸⁴ One of the tactics now used by the High Commission was to treat the refusal to take the oath as a confession justifying a guilty verdict.¹⁸⁵

The High Commission proceedings of the day show renewed objection to the oath. The basis for objection increasingly seemed to be compulsory self-incrimination per se, rather than being kept ignorant of the charges.¹⁸⁶ However, writs of prohibition were seldom sought in the common law courts, perhaps because of a perception that the courts had been packed. Moreover, Parliament, which in earlier times had joined the struggle against the oath, was kept out of session for eleven years.¹⁸⁷ The story of the Carolinian era, therefore, is the story of courts other than the High Commission.

The first chapter of the story occurred in 1628. John Felton, the admitted murderer of the Duke of Buckingham, was examined by the Privy Council before being tried in the Court of King's Bench. When he denied that he had had co-conspirators, he was threatened with torture by the Bishop of London.

Felton replied, if it must be so he could not tell whom he might nominate in the extremity of torture, and if what he should say then must go for truth, he could not tell whether his lordship (meaning the bishop of London) or which of

¹⁸³ It is also worth observing that, unlike Lambard, whose treatise was discussed *supra* in the text accompanying note 135, Staundiford does not explicitly base his position on the *nemo tenetur* doctrine. Indeed, I have found nothing from any of the eras under discussion that relies on *nemo tenetur* as a basis for rejecting involuntary pleas of guilty. On the other hand, I have found nothing that denies a connection.

¹⁸⁴ LEVY, *supra* note 13, at 266–67.

¹⁸⁵ *Id.* at 269.

¹⁸⁶ *See id.* at 258–59, 269–70.

¹⁸⁷ *Id.* at 266–67.

their lordships he might name, for torture might draw unexpected things from him: after this he was asked no more questions, but sent back to prison.¹⁸⁸

What happened thereafter is not clear.¹⁸⁹ As commonly reported, King Charles, reluctant to order torture by royal prerogative, asked the common law judges whether torture might be ordered under the common law. They unanimously replied that "no such punishment is known or allowed by our law,"¹⁹⁰ thus making it clear that common law processes did not include this expeditious form of compulsory self-incrimination.

The second chapter took place a year later when Charles sought an advisory opinion from the judges as to whether it was high contempt for a person to refuse to be examined regarding treason. The judges replied that it was high contempt as long as "this do not concern himself, but another, nor draw him to danger of treason or contempt by his answer."¹⁹¹ The answer appears to be a rather broad statement of the *nemo tenetur* maxim, a statement not limited to the context of an oath or knowledge of the charges.

The third chapter involved a truly remarkable person, John Lilburne. Lilburne, a clothier's apprentice, was involved in many proceedings, four of which were capital. With doggedness bordering on fanaticism, he breathed still more vitality into the *nemo tenetur* maxim.¹⁹²

Lilburne was first tried in 1637 in the Star Chamber for shipping seditious books from Holland into England. Prior to the trial, he was examined by the Attorney General's chief clerk in much the fashion that a magistrate might have examined an accused in an ordinary felony case. Lilburne knew the charge and the specifics of affidavits against him. He denied the charge, was willing to answer questions about it, but refused to answer questions that he viewed as raising new matters. As to these matters, he insisted on confronting his accusers before answering questions. He was placed in jail.¹⁹³ His justification was "the law of God" and "the law of the land,"¹⁹⁴ the latter apparently another misguided reference to Magna Carta.

¹⁸⁸ Proceedings against John Felton, 3 Cobbett's State Trials 367, 371 (1628).

¹⁸⁹ See JARDINE, TORTURE, *supra* note 130, at 11-12, 59-62. Jardine disputes the version commonly reported.

¹⁹⁰ Proceedings Against John Felton, 3 Cobbett's State Trials 367, 371 (1628).

¹⁹¹ Proceedings Against William Stroud and Others, 3 Cobbett's State Trials 235, 237 (1629).

¹⁹² One simply cannot read the story of Lilburne without constructing an image of the man. As I imagine the story, the role of Lilburne is played, with appropriate English accent, by the French actor Gerard Depardieu.

¹⁹³ LEVY, *supra* note 13, at 273.

¹⁹⁴ Trial of John Lilburne, 3 Cobbett's State Trials 1315, 1318 (1637). The account was written by Lilburne himself. Lilburne makes no mention of being put under oath at the beginning of the examination. Whether or not he was, however, his objection was to the substance of the questions.

The proceedings then moved into the Star Chamber for trial. Contrary to its ordinary practice, the court followed High Commission procedure in Lilburne's case by denying him a copy of the charges and insisting on an oath. Lilburne refused to take the oath on the ground that he did not know the charges. Eventually the Attorney General gave him some notice by reading a co-conspirator's affidavit of accusation. Lilburne denied the accusation, but still refused to take the oath.¹⁹⁵ One of his reasons was that he would not swear to answer all questions when he had previously been asked irrelevant questions.¹⁹⁶ Another reason was that he believed that there was no other evidence against him.¹⁹⁷ Lilburne challenged the prosecution to produce witnesses, and he promised to reply to them.¹⁹⁸ Again, he was put in jail. When he was brought back to Star Chamber, he was read a more detailed affidavit from the same accuser. Again, he denied the charge, but refused to take an oath, denouncing it as a High Commission oath even though he knew the charge.¹⁹⁹ Lilburne was clearly going after bigger game than notice of the charges. He was held in contempt and was pilloried, whipped, fined, and jailed. In the pillory, he said to onlookers that an oath and self-accusation were against God's law which required two or three witnesses to establish guilt.²⁰⁰ He added that self-accusation was against the self-protective law of nature.²⁰¹ While in jail, he managed to smuggle out writings saying that he had been imprisoned for refusing to accuse himself.²⁰²

In 1640, the smell of civil war was in the air, and Charles was forced to reconvene Parliament in order to get an appropriation of money. Dominated by Puritans and those learned in the common law, Parliament freed Lilburne and others and then turned its attention to reform. Recognizing that it was easy to establish or contrive the public disrepute that triggered the oath in High Commission proceedings, Parliament performed radical surgery by abolishing both the High Commission and Star Chamber in 1641. Common law courts and procedures were thereafter to be used when life, liberty, or property was at stake. In addition, Parliament abolished the oath *ex officio* in church courts and made it a crime to administer the oath or to impose penalties on those who refused to take it. Yet Parliament did nothing about the procedure in criminal cases in common law courts.²⁰³ Although neither an oath nor torture was used, suspects were under considerable pressure to incriminate themselves both at the

¹⁹⁵ LEVY, *supra* note 13, at 275.

¹⁹⁶ Lilburne, 3 Cobbett's State Trials at 1321.

¹⁹⁷ *Id.* at 1322.

¹⁹⁸ *Id.*

¹⁹⁹ LEVY, *supra* note 13, at 275-76.

²⁰⁰ *Id.* at 277.

²⁰¹ Lilburne, 3 State Trials at 1332.

²⁰² LEVY, *supra* note 13, at 277-78.

²⁰³ *Id.* at 278-82.

preliminary examination and at trial.²⁰⁴ Thus, despite the dramatic action of Parliament, a truly protective right against compulsory self-incrimination did not really exist throughout English law.

During the next few years, Parliament gave conflicting signals regarding a right of silence. In *Proceedings Against the Twelve Bishops*,²⁰⁵ an impeachment for high treason, the accused refused to answer whether they had signed a petition attacking Parliament. "[I]t was not charged in the impeachment; neither were they bound to accuse themselves."²⁰⁶ Even though the accused had not been placed under oath, an answer was not compelled. On the other hand, in another proceeding involving Lilburne, Parliament showed no respect for silence. Having risen in the Parliamentary army, Lilburne became disillusioned with the Parliamentary program and resigned in 1645. Parliament was controlled by Presbyterians who were intolerant of other Puritan sects, including the Levellers, of which Lilburne was a member. Parliament imposed censorship, and Lilburne, whose concern for civil liberties was broad, began to write in support of freedom of speech and religion. An investigative committee of the House of Commons twice summoned him to answer for his tracts, but he fought the summons and was released. Then he was arrested for libelling the Speaker of the House. He appeared and refused to answer questions against himself, relying again on Magna Carta's "law of the land" provision. He demanded that a legislative investigating committee follow common law procedure. He was jailed for refusing to answer. In jail, he wrote another tract in which he asserted broadly a right not to answer incriminating questions. In one of the more interesting turns in the history of the right of silence, Lilburne also attacked the practice of questioning defendants in common law criminal proceedings.²⁰⁷

Lilburne was eventually released, but was in trouble again in less than a year. Summoned for examination for criticizing a member of the House of Lords, he refused to respond. He stuck his fingers in his ears to avoid hearing the charge against him. While he served another jail term, others took up the cause, writing tracts accusing the House of Lords of using High Commission and Star Chamber tactics. One of the writers, Richard Overton, was jailed for refusing to answer interrogatories in the House of Lords. He protested that no one should be forced by any governmental authority to take an oath or to answer incriminating questions. Others followed the example of Lilburne and Overton, refusing to answer in various criminal proceedings.²⁰⁸ The argument

²⁰⁴ The procedure in common law cases is discussed *supra* in the text accompanying notes 103, 128, 132 and *infra* in the text accompanying notes 225-31.

²⁰⁵ 4 Cobbett's State Trials 63 (1641).

²⁰⁶ *Id.* at 76.

²⁰⁷ LEVY, *supra* note 13, at 288-91.

²⁰⁸ *Id.* at 292-94.

in favor of a right of silence was beginning to take on a life of its own apart from the oath *ex officio*.

In 1647, a Leveller petition was addressed to the House of Commons. It specifically recommended that "no authority whatsoever" should have the power to compel self-incriminating information. The recommendation was tied neither to oath nor to notice of charges. A call for a right of silence appeared as well in subsequent Leveller documents over the next several years, as did a call for a written constitution, proportioned unicameral legislature, freedom of press and religion, equality, and trial by jury. "The right against self-incrimination which had begun as a protest against the coercion of conscience was growing as part of . . . 'the first great outburst of democratic thought in history, with John Lilburne and Richard Overton leading the way.'"²⁰⁹

The events described above occurred during the period of the English Civil War. One of the first major battles occurred in October 1642. The last battle took place in August 1648.²¹⁰ With the overthrow of Charles by Cromwell's Parliamentary forces, Lilburne was released from confinement and almost immediately began to complain that Cromwell's military court was trying to compel people to incriminate themselves. He inveighed against substituting one form of tyranny for another. In March 1649, Lilburne and three others were arrested. Brought before the Council of State (then the governing body of England) for a preliminary, evidence-gathering examination, they refused to answer questions and were jailed on suspicion of high treason. In October, Lilburne was indicted by a grand jury and capitally tried for high treason.²¹¹

Lilburne was tried by jury. Presiding over the trial was an extraordinary commission of forty judges. Lilburne challenged everything. He lectured the throng on the right against compulsory self-incrimination as a part of fair play and fair trial. He ran roughshod over the court, insisting that he had a right to counsel and to a copy of the indictment—rights that were half a century away. When he was asked to enter a plea, he invoked a right of silence. This prompted Lord Keble to assure Lilburne that he would not be compelled to answer questions during the trial, but that he was legally required to plead. When he was questioned during the trial, he refused to answer whether a tract was in his handwriting. The prosecutor said that this was an admission, but Lilburne was not forced to answer. The prosecution presented some proof of

²⁰⁹ *Id.* at 296 (quoting MARGARET JUDSON, *THE CRISIS OF THE CONSTITUTION* 381 (1949)).

It is interesting to note that the Talmudic protection against compulsory self-incrimination also developed as part of a libertarian package. See Irene M. Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 N.Y.U. L. REV. 955, 1027-30 (1988).

²¹⁰ 3 *ENCYCLOPEDIA BRITANNICA* 113 (15th ed. 1986).

²¹¹ LEVY, *supra* note 13, at 298-300. The proceedings are reported in Trial of Lieutenant-Colonel John Lilburne, 4 Cobbett's State Trials 1269 (1649).

authorship which Lilburne denigrated as insufficient. Lilburne turned the trial into a forum for his political speeches, and the jury found him not guilty.²¹²

Two years later, Lilburne was tried again. This time the proceedings took place in the House of Commons on a charge of defaming a member of Parliament. Lilburne was summarily tried, convicted, and sentenced to banishment. He fled to Holland.²¹³ Violation of the banishment order was a capital offense. In 1653, Lilburne returned to England and was again tried for his life. He demanded and got a copy of the indictment and the assistance of counsel to challenge it. During the trial, Lilburne refused to admit that he was the person named in the banishment order. He was again acquitted. Cromwell's response was to jail and later exile Lilburne. Lilburne died in exile in 1657. Parliament's response to the acquittal was to order that the jury be examined by the Council of State. Several jurors refused to answer questions.²¹⁴ Lilburne's insistence on a right against compulsory self-incrimination had trickled down.

John Lilburne lost the very last battle, but he won the war. Even before his final trial, a protection against compulsory self-incrimination had received strong recognition. In the *Trial of Charles I*,²¹⁵ in 1649, Holder, a prosecution witness, was reluctant to testify. "Whereupon, the Commissioners finding him already a Prisoner, and perceiving that the Questions intended to be asked him, tended to accuse himself, thought fit to wave [sic] his Examination. . . ." ²¹⁶ It is not clear that Holder was even asserting a right of silence. Nor is it clear that the court felt itself bound to recognize such a right. It is clear, however, that the court's ruling was based on it. Moreover, the case appears to be the first in which a witness, as opposed to a party, was protected.

In the decades after Lilburne's death, a right of silence was clearly recognized, even during the troubled time of the Restoration.²¹⁷ It is not necessary to consider the cases individually, but it is worth noting that on no fewer than nine occasions during 1660–1696, courts protected witnesses by gratuitously invoking a right of silence for them. These courts did not merely wait for the witness to object and then sustain the objection.²¹⁸ One

²¹² LEVY, *supra* note 13, at 302–09.

²¹³ *Id.* at 309–10.

²¹⁴ *Id.* at 310–12.

²¹⁵ 4 Cobbett's State Trials 993 (1649).

²¹⁶ *Id.* at 1101.

²¹⁷ 8 WIGMORE, *supra* note 3, § 2250, at 289–90 & nn.105–06; LEVY, *supra* note 13, at 313–19.

²¹⁸ In chronological order, the cases are *Trial of Adrian Scroop*, 5 Cobbett's State Trials, 1034, 1039 (1660); *Trial of Nathanael Reading*, 7 Cobbett's State Trials 259, 296–97 (1679); *Trial of Thomas White*, 7 Cobbett's State Trials 311, 361 (1679); *Trial of Richard Langhorne*, 7 Cobbett's State Trials 418, 435 (1679); *Trial of Roger Palmer*, 7 Cobbett's State Trials 1067, 1096 (1680); *Trial of Dr. Oliver Plunket*, 8 Cobbett's State Trials 447, 481 (1681); *Trial of Thomas Rosewell*, 10 Cobbett's State Trials 147, 169

interpretation of these cases is that the courts regarded it as improper even to ask a question calling for an incriminating answer. Another interpretation is that the courts simply assumed that the witness did not want to give self-incriminating information and made the witness's objection for him.²¹⁹ Which interpretation accurately reflects the motivation of the courts in these cases cannot be determined from the records.

It is also worth noting that, in the *Trial of Nathanael Reading*, one of the cases under discussion, the court knew that the witness had already received a pardon and ran no risk of criminal liability. Hence, the court's gratuitous intervention served only to protect the reputation of the witness.²²⁰ All of these cases demonstrate that during the period when the protection against compulsory self-incrimination first became fixed in English law, the courts gave it a generous interpretation. There was less generosity, however, in "ordinary" criminal cases.

In criminal trials, the defendant still had to represent himself, and the trial remained an altercation between prosecution and defendant. As before, the defendant participated actively, and was questioned by the court.²²¹ Indeed, in the *Trial of Nathanael Reading*, in which the court gratuitously protected a witness, it frequently questioned the defendant.²²² In none of these cases, however, did the defendant object to the questioning or did the court threaten the defendant with jail for refusing to answer. Lilburne's 1649 trial seemed to

(1684); Trial of Titus Oates, 10 Cobbett's State Trials 1079, 1099-1100 (1685); Trial of Sir John Freind, 13 Howell's State Trials 1, 16-18 (1696). In *Palmer's* case, the judicial remonstrance occurred after the witness had already answered the question. In *Freind's* case, judicial action may have been triggered by the fact that the Solicitor General advised the witness as soon as the question was asked.

I hasten to add that later practice came to require, and still requires, that the right be affirmatively claimed by a party in a civil case or by a nonparty witness in any case. See 8 WIGMORE, *supra* note 3, § 2268. On the other hand, it is improper in a criminal case for the prosecutor even to call the defendant as a witness. *Id.* at 406-08.

Professor Levy has characterized the right against self-incrimination as a "fighting right." LEVY, *supra* note 13, at 375. This accurately describes the protection given to a witness or civil party. It does not accurately describe the protection given to the defendant in a criminal trial. Nor does it accurately describe the protection given to the witness in the early cases cited above. Professor Levy, however, regards these cases as exceptional, *id.*, and so they proved to be.

²¹⁹ In *Rosewell*, 10 Cobbett's State Trials at 168, the witness had been reluctant to answer an earlier question that sought incriminating information. Hence, there was a factual basis for assuming that she would not want to answer similar questions. Any assumption in the other cases would be intuitive.

²²⁰ This too is contrary to modern practice. See 8 WIGMORE, *supra* note 3, § 2255.

²²¹ See Trial of Sarah Baynton, 14 Howell's State Trials 598, 620 ff. (1702); Trial of John Twyn, 6 Cobbett's State Trials 513, 531 ff. (1663); see also 1 STEPHEN, HISTORY, *supra* note 81, at 337.

²²² 7 Cobbett's State Trials at 302 ff.

settle that the defendant had a right to refuse.²²³ Indeed, as the seventeenth century drew to a close, so to a large extent did judicial efforts to interrogate defendants at trial.²²⁴

In preliminary hearings, justices of the peace continued to use their statutory authority to examine the accused, and sometimes acted in an "exceedingly zealous and by no means scrupulous" manner.²²⁵ There is no evidence that answers were compelled by force. Torture, seldom used in ordinary criminal cases,²²⁶ virtually ceased to exist for all purposes after 1640.²²⁷ However, there is some evidence that justices tried to induce confessions by threatening to withhold bail²²⁸ and by using tricks. For example, the report of the *Trial of Colonel James Turner*,²²⁹ discloses that the justice may have "managed matters so as to induce [the burglary suspect] to admit to [the victim], upon the [victim's] engaging not to prosecute, that he knew where the property was."²³⁰ Professor Levy concludes that "[f]or all practical purposes . . . the right against self-incrimination scarcely existed in the pre-trial stages of a criminal proceeding."²³¹

Professor Levy may have overstated his case. Records of JP examinations are sparse,²³² and one ought not assume that the examination in *Turner* was typical.²³³ Although trial proceedings were open to the public, preliminary examinations were not.²³⁴ Rights, like plants, grow better in the light, and it is possible that some magistrates simply got away with whatever they could.

A less cynical possibility is that magistrates might have believed that they were not disregarding the protection against compulsory self-incrimination. After all, defendants were still questioned at trial, so the right was in an

²²³ See 1 STEPHEN, HISTORY, *supra* note 81, at 358.

²²⁴ LEVY, *supra* note 13, at 323; 1 STEPHEN, HISTORY, *supra* note 81, at 440.

²²⁵ 1 STEPHEN, HISTORY, *supra* note 81, at 223.

²²⁶ See *supra* note 130 and accompanying text.

²²⁷ JARDINE, TORTURE, *supra* note 130, at 57-58. In *Trial of Thomas Tonge*, 6 Cobbett's State Trials 225, 259 (1662), the defendant claimed that he had made a pretrial confession after being threatened with torture.

²²⁸ *Trial of Colonel James Turner*, 6 Cobbett's State Trials 565, 572-73 (1664).

²²⁹ *Id.*

²³⁰ 1 STEPHEN, HISTORY, *supra* note 81, at 223. The pages cited by Stephen do not disclose that the Justice of the Peace [JP] induced the victim to make a false promise not to prosecute. Rather, they suggest that the victim made a true promise which the JP induced him to break. *Turner*, 6 Cobbett's State Trials at 574. They also show that the JP said, "I will do you all the favour I can," in an effort to induce a confession. *Id.* at 573.

²³¹ LEVY, *supra* note 13, at 325.

²³² See LANGBEIN, RENAISSANCE, *supra* note 120, at 45.

²³³ There is some evidence that magistrates did honor a suspect's denial of the crime or refusal to answer at preliminary examination. See *id.* at 53.

²³⁴ See authorities collected in *Gannett Co. v. DePasquale*, 443 U.S. 368, 387-90 (1979); *id.* at 394-95 (Burger, C.J., concurring).

evolutionary state. It is certainly not clear that a broken promise, especially one made by a private person, is offensive to the privilege.²³⁵ Nor is it clear that threatening to withhold bail from a capitally charged suspect who refuses to cooperate is the equivalent of threatening a recalcitrant witness with jail for contempt. Even at trial, the defendant's refusal to answer might be called to the jury's attention as evidence of guilt, so it is understandable that a JP might take account of it in deciding whether to release on bail. Since the right against compulsory self-incrimination was not omni-protective, a magistrate who adverted to it might rationally have resolved any doubts in favor of using the techniques disclosed by the *Turner* case. Finally, it must be remembered that the JP's examination was authorized by statute. In a country without a written constitution, statutes trump judicial decisions.²³⁶ Even if there were a clear conflict between the examination statutes and the right of silence, the statutes would prevail. Whether any of these explanations is correct cannot be known. There is no case that explores the applicability of the right of silence to the JP's examination during the period in question, and the few treatises that existed are unilluminating.²³⁷ All that can safely be said is that some justices used tactics that are inconsistent with a broad protection against compulsory self-

²³⁵ Later in this Article, I shall discuss whether the common law privilege is offended when a confession is induced by promises, both governmental and private. *See infra* notes 458–63 and accompanying text.

²³⁶ *See* Reg. v. Scott, 1 Dears. & Bell 47, 59, 169 Eng. Rep. 909, 914 (Cr. Cas. Res. 1856).

²³⁷ As mentioned *supra* at note 135, Lambard's *Eirenarcha*, a treatise for justices of the peace, contained the following statement:

Here you may see (if I be not deceived) when the examination of a felon first began to be warranted amongst us. For at the common law, *nemo tenebatur prodere seipsum*, and then his fault was not to be wrung out of himself, but was to be discovered by other means and men.

2 LAMBARD, *EIRENARCHA*, *supra* note 135, at 213. The statement appeared in subsequent editions as well. *See id.* at 211 (1607). Lambard's unembellished statement suggests that the Marian statutes prevailed over the common law doctrine, but he really does not discuss the matter.

Another leading treatise of the era contains a variation of Lambard's statement:

The offender himself shall not be examined upon oath; for by the common law, *nullus tenetur seipsum prodere*; neither was a man's fault to be wrung out of himself (no not by examination only) but to be proved by others, until the statute of 2.& 3. P.& M. c.10 gave authority to the justice of the peace to examine the felon himself.

DALTON, *supra* note 124, at 273 (1619). Dalton's statement is even less to the point than Lambard's, for it involves an additional matter—examination upon oath—which is irrelevant to our present concern.

incrimination. However, there is nothing intrinsic to even a narrow protection that would make it wholly inapplicable to preliminary examinations.²³⁸

2. Admissibility of Confessions

The rules regarding admissibility of confessions were generally the same as in preceding eras. Neither the cases nor the treatises refer to any rule that an involuntary confession is inadmissible.²³⁹ There was a continuation of the provision, first seen in the Edwardian statutes, that a plea of guilty (or, perhaps, a confession) to treason be made willingly and without violence in order to displace the requirement that guilt be proved by two witnesses,²⁴⁰ and we are justified in assuming a continuation of the position, apparently first voiced by Staundiford in 1607,²⁴¹ that an involuntary plea of guilty should not be received by the court in any case. Moreover, the suggestion in cases of the Marian and Elizabethan eras that the credibility of a confession is lessened if the confession is involuntary, was repeated in a case decided in 1645.²⁴²

During the period under consideration, there were two noteworthy developments. The first was a treatise on the Court of Star Chamber written by

²³⁸ Notwithstanding the generality of their discussions, both Lambard and Dalton treat the protection as intrinsically applicable to preliminary examinations. *See supra* notes 134–38 and accompanying text. It is perfectly understandable that Dalton limited his discussion to examination under oath. At the time he wrote, the compulsory oath was a core concern of those who were trying to establish the right. *See supra* notes 160–69 and accompanying text. Indeed, given that fact, it is Lambard's broader statement that is the perplexing one.

²³⁹ Had such a rule existed, one would have expected to find a reference to it in the Trial of Colonel James Turner, 6 Cobbett's State Trials 565, but there is nothing. SIR MATTHEW HALE, PLEAS OF THE CROWN 264 (London, Atkyns & Atkins 1682), states that an accused's confession, obtained at preliminary examination, is admissible. There is no qualification that the confession must be voluntary. In the Trial of Thomas Tonge, the defendant's confession was considered against him even though he claimed that he had confessed only after being threatened with the rack. 6 Cobbett's State Trials 225, 259 (1682).

²⁴⁰ The concern was seen both in statute and in case law. *See* An Act for the Regulating of Trials in Cases of Treason and Misprision of Treason, 1695, 7 Will. 3, ch.3, § 2 (Eng.), 9 STAT. AT LARGE (Eng.) 390 (Danby Pickering ed., 1764); Tong's Case, Kelyng's Rep. 20 (1664). Section 1 of the statute is noteworthy in the history of civil liberties for giving the person accused of treason the right to make a full defense by counsel (including court-assigned counsel on request), the right to a copy of the indictment, and the right to present sworn witnesses for the defense.

²⁴¹ *See supra* notes 181–83 and accompanying text.

²⁴² Trial of Lord Macguire, 4 Cobbett's State Trials 654, 675 (1645) (defendant's confession taken at preliminary examination).

William Hudson, a lawyer who practiced before the court.²⁴³ The court had two forms of proceedings, plenary and summary. Plenary proceedings involved written pleadings and the examination of witnesses. Summary proceedings were oral and were referred to as *ore tenus*. For the court to use *ore tenus*, the defendant's confession was essential.

For when some dangerous persons attempt some unusual, and perhaps desperate inventions . . . these persons are apprehended by a pursuivant or messenger, and privately examined without oath, or any compulsory means, concerning the fact. If he shall deny the accusation, then cannot the court proceed against him *ore tenus*; but if he confess the offense freely and voluntarily, without constraint, then may he be brought to the bar; at which time his confession is shewed him; and if he acknowledge it, then who can doubt but that the court may justly proceed *ex ore suo* and give a judgment against him²⁴⁴

The confession to which this passage refers is an ordinary confession, not a guilty plea. That is apparent from the phrase "privately examined without oath." On the other hand, the confession functions as a plea. If the accused acknowledges the confession in open court, the court may use a summary, oral procedure "and give a judgment against him." If the confession is not voluntary or not acknowledged, the court must use the plenary procedure.²⁴⁵ Thus, although the passage from Hudson speaks to a requirement of voluntariness, the reference does not relate to admissibility of confessions. Rather, the reference relates to Staundiford's concern about the acceptability of guilty pleas.²⁴⁶

²⁴³ WILLIAM HUDSON, A TREATISE ON THE COURT OF STAR CHAMBER (*ante* 1635), in 2 FRANCIS HARGRAVE, COLLECTANEA JURIDICA, at B (London, Bel Yard, Temple Bar 1792). See LEVY, *supra* note 13, at 106.

²⁴⁴ HUDSON, *supra* note 243, at 127.

²⁴⁵ *Id.*

²⁴⁶ But see Laurence A. Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 77 n.73 (1989) ("Hudson's reference is to the rule of evidence known as the voluntariness doctrine . . . and not to the privilege against self-incrimination. . . ."). Professor Benner's only explanation is that the privilege "had not yet entered its second stage of development." *Id.* However, the rule of evidence known as the voluntariness doctrine is an exclusionary rule. It did not exist in English law at the time Hudson wrote. Thus, Hudson could not have been referring to it. Moreover, the privilege was then well enough developed for Hudson to make explicit reference to it in a subsequent passage. See *infra* text accompanying note 248. Consequently, if one assumes that the passage must refer to either the involuntariness rule or the privilege, it is plausible to read it as referring to the privilege. The significance of this reading is that it *may* make the privilege applicable to unsworn examinations conducted by persons who were performing duties quite similar to those performed today by police officers, although only in the context of deciding whether the confession may function as a

Of potentially greater significance is a passage which discusses both confessions and the *nemo tenetur* doctrine. As noted earlier, some members of the court said in Tresham's case that *nemo tenetur* could be asserted by the defendant in a capital matter, but that since Star Chamber did not have jurisdiction to impose capital punishment, *nemo tenetur* was not available in a Star Chamber proceeding.²⁴⁷ However, some of the noncapital cases heard in Star Chamber involved potential capital liability if tried elsewhere, and the court therefore had to take care not to compel a confession. Alluding to this, Hudson said: "But I observe that the court, in all these cases which trench to felony, never examined it further than the party's confession; for in these cases *nemo tenetur prodere seipsum*, but upon voluntary confession without oath."²⁴⁸ The words "examined" and "without oath" suggest that the confession to which the passage refers is, once again, an ordinary confession, not a guilty plea. The passage also links voluntariness to *nemo tenetur* by suggesting that *nemo tenetur* means that a confession has to be voluntary. The passage, however, is distressingly ambiguous in that it neither says that an involuntary confession is inadmissible nor attributes any other function to voluntariness. Thus, although the linkage of voluntariness to *nemo tenetur* is interesting and provocative, ultimately we do not know what to make of it.

Hudson's is the first reference I have found linking the words "voluntary confession" to *nemo tenetur*. It was not the last, however, as we shall see from the second development that occurred during this era, the 1658 case of *Attorney General v. Mico*.²⁴⁹ The defendant was charged in the Court of Exchequer with evading taxes on imported goods by bribing two tax collectors. A civil action for discovery was brought, apparently for the purpose of making the defendant reveal the details of the transaction. One of the defendant's lawyers argued that the defendant could not be compelled to answer the equity bill because "it is against Law and Reason . . . to accuse himself."²⁵⁰ The defendant's other lawyer claimed that the bill for discovery was against the law of nature:

hence the Rule *nemo tenetur seipsum prodere, vel accusare*; and upon that Rule it is, That if a Man will prefer a Bill to compel me to answer what Trespasses I have committed upon his Land, or what other Injury I have done him; I shall not be compelled to answer to such a Bill, as the Common Rule in all Courts is, because it is a matter of Crime and Tort; for which I am finable and punishable in another Court, over and above what Damages the Party is to

guilty plea. I say *may* because it is not clear from Hudson's passage that the royal messengers also interrogated those whom they arrested. It is possible that the interrogation was conducted by other officials.

²⁴⁷ See *supra* notes 93-94 and accompanying text.

²⁴⁸ HUDSON, *supra* note 243, at 64.

²⁴⁹ Hardres 137, 145 Eng. Rep. 419 (Ex. 1658).

²⁵⁰ *Id.* at 137, 145 Eng. Rep. at 419.

recover against me. Upon this ground, though the Parties own Confession of a Crime be the clearest Proof in the Law, yet if such a Confession proceed from Dread, or be extorted by any Compulsion, it ought not to be received against him. A Woman was indicted for the stealing of Bread to the value of 2s. who said that she had done it by the command of her husband; and the Justices out of compassion to the Prisoner would not Record her Confession, but gave her leave to plead *not guilty*, which she did, and was acquitted. If a Prisoner disclose any thing to the Court which makes him a felon, yet the Court will not take advantage of it, but suffer him to plead *not guilty*; and these Cases depend upon the formed Rule, viz. That a Man is not obliged to condemn himself.²⁵¹

The report does not disclose the court's action, so we are left with the arguments of counsel as one indicium of the thinking of the times.²⁵² It is clear from the examples that counsel was using the word "confession" in the sense of guilty plea rather than extrajudicial confession. Hence, it would be wrong to assert that the rule barring the admissibility of involuntary, extrajudicial confessions was recognized in 1658. On the other hand, it is equally clear that

²⁵¹ *Id.* at 139–40, 145 Eng. Rep. at 420–21 (citations omitted).

²⁵² Several scholars have attributed the material quoted in the text to Chief Justice Widdrington. See LEVY, *supra* note 13, at 494–95 n.41; Benner, *supra* note 246, at 95–97. I believe that they are wrong. Six paragraphs earlier, one finds the argument of "*Shaftoe pro defendente*." Attorney Gen. v. Mico, Hardres at 138, 145 Eng. Rep. at 420. In the next paragraph, Widdrington replied, "It was usual in the Court of Wards, to compel a Discovery of a Tenure *in Capite. Et Adjornatur*." *Id.* at 139, 145 Eng. Rep. at 420. The next paragraph appears to contain the reporter's note about a precedent. The next two paragraphs are as follows:

At another day, in the same Term, it was argued by *Hardres pro defendente*. In the argument of this Case (it being of great weight and consequence) I shall insist 1st. upon Law. 2. Upon Reason. 3. Upon Authorities. 4. I shall give Answer to some Objections.

1. I conceive the Demurrer consistent with, and agreeable to all manner of Laws, viz. To the Law of God, the Law of Nature, and the Law of the Land.

Id. at 139, 145 Eng. Rep. at 420. Two paragraphs later, under the heading "For the law of Nature," appears the paragraph quoted in the text.

From the sequence and content of the paragraphs, it is clear that defense lawyer Hardres made the quoted statement. Any doubt on this score is put to rest by the final paragraph of the report which states, "He concluded, and pray'd Judgment *pro Defendente*." *Id.* at 147, 145 Eng. Rep. at 424. This paragraph could hardly refer to Chief Justice Widdrington.

The willingness of the reporter to report in detail the argument of defense counsel Hardres may be explained by the fact that the reporter's name was Hardres. From the suspicious fact that no result is reported, one may infer that the defendant lost.

counsel linked the unacceptability of involuntary guilty pleas to *nemo tenetur*. Indeed, the latter is said to be the justification for the former.

Counsel's argument has logical appeal. If it is offensive to the *nemo tenetur* doctrine to compel the accused or even a witness to answer incriminating questions during the course of a trial, it should be all the more offensive to compel a guilty plea and abort the trial.

The unacceptability of involuntary guilty pleas has been regarded as a precursor of the rule barring the admissibility of involuntary confessions.²⁵³ Consequently, the argument in *Mico* affords a foundation, albeit small, for saying that the involuntary confession rule itself is based (at least in part) on *nemo tenetur*,²⁵⁴ and for questioning the position, most forcefully advocated by Wigmore, and adopted by some of the critics of *Miranda*, that the two doctrines are wholly distinct.²⁵⁵

G. England 1700–1850

After the beginning of the eighteenth century, the protection against compulsory self-incrimination was well entrenched in English law and broadly interpreted by the courts.²⁵⁶ Our story therefore shifts to the development and rationale of the rule barring the admissibility of involuntary confessions, and to the relationship, if any, between that rule and the right against compulsory self-incrimination. In the latter part of the period in question, we find the development of police forces and the emergence of police interrogation in lieu of judicial examination. Hence, we must also ask whether the *nemo tenetur* principle is applicable to police interrogation.

The collateral or remote antecedents in English law of the rule barring the admissibility of an involuntary confession are: (1) the statutes which required that a guilty plea (or, perhaps, any confession) be made willingly and without

²⁵³ 3 WIGMORE, *supra* note 80, § 819, at 296 ("[T]here must have been some extension, in the minds of Bar and Bench, to the usage for extrajudicial confessions, of the phrases and notions originally peculiar to confessions at bar upon arraignment."). Another precursor may have been the doctrine that an involuntary confession was less believable than a voluntary one. See discussion of cases *supra* at notes 151–54, 242 and accompanying text.

²⁵⁴ The ambiguous passages from Hudson seem to point uncertainly in the same direction. See *supra* notes 243–48 and accompanying text.

²⁵⁵ See 3 JOHN H. WIGMORE, EVIDENCE § 823(c) (3d. ed. 1940).

²⁵⁶ See, e.g., *Brownsword v. Edwards*, 2 Ves. Sen. 242, 244, 28 Eng. Rep. 157, 159 (Ch. 1750) (defendant not required to make discovery in real property case because disclosure might subject her to punishment in an ecclesiastical court for marrying her dead sister's husband); *Trial of Thomas Earl of Macclesfield*, 16 Howell's State Trials 767, 920–23, 1146–50 (1725) (court holds in effect that witness need not give information that tends to incriminate him or that would be a link in a chain leading to incrimination).

violence in order to displace the two-witness rule in treason cases;²⁵⁷ (2) cases from various eras which suggested that a confession's voluntariness bore on its credibility;²⁵⁸ (3) Staundiford's 1607 treatise which insisted that a guilty plea should not be accepted in any case if motivated by fear, menace or duress;²⁵⁹ (4) ambiguous references in Hudson's treatise on Star Chamber which seem to link a requirement of voluntariness to the *nemo tenetur* doctrine;²⁶⁰ and (5) defense counsel's argument in *Mico* which used the same doctrine to justify the involuntary-plea rule.²⁶¹ These antecedents arose in the 16th and 17th centuries.

The 18th century saw additional strands in the development of the rule. The first strand was a passage that appeared in the 1736 edition of Sir Matthew Hale's *Historia Placitorum Coronae*. The passage was undoubtedly added by the editor, Sollom Emlyn.²⁶² The passage is part of a chapter on written evidence obtained by a justice of the peace under the Marian examination statutes. It states:

By the statute of 1 & 2 P. & M. *cap.* 13. and 2 & 3 P. & M. *cap.* 10. Justices of peace and coroners have power to take examinations of the party accused, and informations of the accusers and witnesses . . . and are to put the same in writing, and are to certify the same to the [court of trial jurisdiction].

These examinations and informations thus taken and returned may be read in evidence against the prisoner, if the informer be dead, or so sick, that he is not able to travel, and oath thereof made; otherwise not.

But then, 1. Oath must be made either by the justice or coroner, that took them, or the clerk that wrote them, that they are the true substance of what the informer gave in upon oath, and what the prisoner confessed upon his examination. 2. As to the examination of the prisoner, it must be testified, that he did it freely without any menace, or undue terror imposed upon him; for I

²⁵⁷ An act for the repeal of certain statutes concerning treasons and felonies, 1547, 1 Edw. 6, Ch. 12 (Eng.); 5 STAT. AT LARGE (Eng.) 259 (Danby Pickering ed., 1763).

²⁵⁸ Trial of Lord Macguire, 4 Cobbett's State Trials 654 (1645); Trial of Sir Christopher Blunt, 1 Cobbett's State Trials 1409 (1600); Duke of Norfolk's Trial, 1 Cobbett's State Trials 957 (1571); Duke of Somerset's Trial, 1 Cobbett's State Trials 515 (1551).

²⁵⁹ See *supra* note 182 and accompanying text.

²⁶⁰ See *supra* note 243 and accompanying text.

²⁶¹ Attorney Gen. v. Mico, Hardres 137, 139-40, 145 Eng. Rep. 419, 420-21 (Ex. 1658).

²⁶² SIR MATTHEW HALE, *HISTORIA PLACITORUM CORONAE* (Sollom Emlyn ed. 1730) (London, E. Rider, Little-Britain 1800). Hale died in 1676, and his work was first published in 1678. I have not seen the 1678 edition, but the passage does not appear in the 1682 edition, which I have seen. I have been informed by the Reference Department of the Law Library of The Ohio State University College of Law that the passage first appears in the 1736 edition, which Emlyn edited. Emlyn was a law reformer and barrister of great reputation. See 6 DICTIONARY OF NATIONAL BIOGRAPHY 773 (1908).

have often known the prisoner disown his confession upon his examination, and hath sometimes been acquitted against such his confession; and the reason why these examinations and informations are allowable in evidence (under the cautions above premised,) is, because they are judges of record, and the informations before them upon oath are authorized and required by act of parliament, and they are judges of the crimes upon which the informations are taken.²⁶³

This passage is clear in one respect: it deals with the written record of a confession made during pretrial examination rather than with a guilty plea made on arraignment in trial court. On other important questions, however, the passage is ambiguous.

The first question is whether the passage deals with the admissibility of confessions or only with their credibility. Emlyn does not squarely answer this question, and different parts of the passage cut in different directions. On the one hand, the words "acquitted against such his [disowned] confession" suggest a scenario in which the confession is admitted by the judge, but is disregarded by the trier of fact, perhaps as lacking credibility. On the other hand, the words "examinations . . . allowable in evidence (under the cautions above premised,)" suggest that a confession is inadmissible (not "allowable") unless it meets previously stated criteria. Although the matter is not free from doubt, there is a way of reconciling these conflicting interpretations. The quoted passage is a part of chapter 38. After the passage, the rest of the chapter discusses three situations in which, in a particular proceeding, a party offers written evidence that was obtained in another proceeding. The issue in all three cases is clearly whether the evidence is admissible, rather than whether admissible evidence is entitled to weight.²⁶⁴ These situations and Emlyn's earlier use of the word "allowable" establish that the concern of chapter 38 is the admissibility of written evidence including the transcript of a confession made at a preliminary examination. Thus, Emlyn is probably saying that a confession is inadmissible unless it meets the criteria of admissibility, *and* that one of the benefits of the rule is that it will effectively keep defendants from attacking their own confessions.²⁶⁵

²⁶³ 2 HALE, *supra* note 262, at 284-85.

²⁶⁴ In the first situation, a motion "that the examination of Mrs. Puckring might be read in evidence" was denied. 2 HALE *supra* note 262, at 285. In the second situation, it was held that the examination of the accused and certain witnesses might be read in evidence at trial. *Id.* In the third situation, it was held that the recorded statements of witnesses could not be read in a prosecution for treason. *Id.* at 286.

²⁶⁵ The conclusion that chapter 38 deals solely with admissibility is supported by chapter 37. The latter chapter introduces the subject of evidence and witnesses and lists five sub-topics. The third, entitled "Those evidences and examinations, that are in writing, what, and when allowable, and what not," 2 HALE, *supra* note 262, at 276, surely deals with

The second question concerns the criteria for determining whether the defendant's confession is admissible. Again, Emlyn does not squarely answer the question. Rather, he says that the examination of the accused is admissible "under the cautions above premised." Immediately preceding this statement is the admonition that there must be testimony that the accused confessed "freely without any menace, or undue terror imposed upon him." Preceding the admonition are requirements that the examination be without oath, that it be put in writing, that it be certified, and that an official testify that the written statement is an accurate record of the oral confession. Given the construction of the paragraph, it is plausible that "the cautions above premised" were intended to include all of the stated conditions. At the very least, however, the "cautions" should include the immediately preceding requirement of testimony that the accused confessed without "menace" or "terror." Thus, it is reasonable to infer from the passage that a confession is inadmissible if obtained by coercion at the Marian examination.

The third question is why a confession is inadmissible if made under menace or terror. Although Emlyn does not explicitly answer the question, he gives us a clue by using the words "acquitted against such his confession." There are only two honest grounds for acquitting the defendant despite a confession that is attributed to him: either the confession was not made at all or it was false. Since the passage presupposes that a confession was made, the inference has to be that a confession made under the influence of menace or terror is inadmissible because it is likely to be false. In other words, screening out putatively unreliable evidence is the object of exclusion.²⁶⁶

The fourth and final question is whether the passage refers to a practice that had gained some acceptance in the case law (albeit unreported) or merely to one that some people thought should be adopted. It is hard to answer this question. Although the surrounding pages are replete with authority, the passage in question is unreferenced. Moreover, no other treatise of the era refers to an emerging requirement of voluntariness as a condition of admissibility.²⁶⁷ A cautious guess, therefore, is that some persons, Emlyn

admissibility. Chapter 37 itself contains the discussion of the first two sub-topics only. The third is addressed by chapter 38.

²⁶⁶ In the passage under consideration, Emlyn did not try to link the inadmissibility of extorted confessions to the *nemo tenetur* maxim. Six years earlier, however, in his preface to the 1730 edition of the *State Trials*, he said, "In other countries, Racks and Instruments of Torture are applied to force from the Prisoner a Confession, sometimes of more than is true; but this is a practice which Englishmen are happily unacquainted with, enjoying the benefit of that just and reasonable Maxim, *Nemo tenetur accusare seipsum*" 1 Cobbett's *State Trials* xxv (1730). I do not know why he did not refer to the *nemo tenetur* maxim in the present context. However, nothing in the passage quoted in the text rejects the maxim as a basis for excluding a confession obtained by menace or threat.

²⁶⁷ 3 WIGMORE, *supra* note 80, § 818, at 295-96 & nn.10-12.

included, believed that the rule should be adopted, perhaps as a logical extension of the antecedent developments noted above. Moreover, at the time Emlyn wrote, there was a special reason for wanting to extend the earlier developments so to condition the admissibility of a confession on a showing of voluntariness: the defendant was an incompetent witness in his own behalf.²⁶⁸ If a false confession had been obtained from him by coercion, the defendant could not by his own testimony point that out to the jury. His words, therefore, could be used *against* him, but not *for* him. Conditioning the admissibility of a confession on a showing of voluntariness might have been regarded as a method of ameliorating the harshness and unfairness of the incompetency rule.²⁶⁹

Emlyn's passage appears to be the first statement in English law that an involuntary confession, as opposed to a guilty plea, is inadmissible.

The second strand in the development of the involuntary confession rule occurred not in a treatise, but in a case that was tried in 1741—the *Trial of Charles White*.²⁷⁰ After the prosecutor offered the confession that the defendant had made at a preliminary examination, the following occurred:

Mr. *Frederick*, counsel for the prisoner. It is opened by Mr. Vernon [the prosecutor], that this Examination contains the prisoner's confession of the fact. I would ask Mr. Britten [the witness who had just authenticated the confession], Was the confession voluntarily made or not? For if it was not voluntarily [sic], it ought not to be read.²⁷¹

Although he did not refer to Emlyn's edition of Hale, Frederick was certainly making the same point: that a confession obtained at a magistrate's examination was inadmissible if involuntary. That this argument must have reflected a doctrine that had gained some acceptability, rather than being merely an advocate's figment, may be inferred from the response of the recorder—a barrister who performed judicial functions such as ruling on the admissibility of evidence:

That is an improper question, unless the prisoner had insisted, and made it part of his case, that his confession was extorted by threats, or drawn from him

²⁶⁸ The incompetency of the defendant as a witness in a criminal case arose in the late 1600s, 1 STEPHEN, HISTORY, *supra* note 80, at 440, as an offshoot of the incompetency of parties in a civil case. LEVY, *supra* note 13, at 324; 2 JOHN H. WIGMORE, EVIDENCE § 575, at 809 (Chadbourn rev. 1979) [hereinafter 2 WIGMORE]. In England, the incompetency remained until 1898. LEVY, *supra* note 13, at 324; 2 WIGMORE, *supra*, § 575, at 817. In the United States, it was abolished in the mid-1800s. *Id.*

²⁶⁹ See *Reg. v. Harz*, [1966] 3 W.L.R. 1241, 1271 (Eng. Crim. App.), *aff'd sub nom. Commissioners of Customs and Excise v. Harz*, 1967 App. Cas. 760.

²⁷⁰ 17 Howell's State Trials 1079 (1741).

²⁷¹ *Id.* at 1085.

by promises; in that case, indeed, it would have been proper for us to enquire by what means the confession was procured: but as the prisoner alleges nothing of that kind, I will not suffer a question to be asked the clerk, which carries in it a reflection on the magistrate before whom the Examination was taken. Let it be read.²⁷²

The recorder did not deny Frederick's assertion that an involuntary confession is inadmissible. To the contrary, he seemed to concede the point. Indeed, his very reference to threats and promises anticipated what was later to be a common statement of the confession rule.²⁷³ Hence, we are justified in concluding that, as early as 1741, involuntary confessions were regarded as inadmissible by at least a segment of the judiciary.²⁷⁴ However, we have no idea of the rationale underlying inadmissibility for neither Frederick nor the recorder tendered any.

What may have been the third strand in the development of the rule barring the admissibility of involuntary confessions occurred in 1742 during a debate in the House of Lords on a proposal to grant witnesses immunity in order to obtain their testimony at a legislative inquiry into the suspected malfeasance of the Chancellor of the Exchequer. As part of an elaborate argument against the proposal, Lord Carteret said,

It is an established maxim, that no man can be obliged to accuse himself, or to answer any questions which may have any tendency to discover what the nature of his defence requires to be concealed. His guilt must appear either by a voluntary and unconstrained confession, which the terrors of conscience have sometimes extorted, and the notoriety of the crime has at other times produced, or by the deposition of such witnesses as the jury shall think worthy of belief.²⁷⁵

It is not clear whether the word "confession" refers to a confession made outside the trial court or to a guilty plea made upon arraignment in the trial court. If Lord Carteret intended to refer to an extrajudicial confession, his

²⁷² *Id.*

²⁷³ See 3 WIGMORE, *supra* note 80, § 825.

²⁷⁴ The recorder was quick to seize upon a procedural ground for rejecting Frederick's argument, but one should not treat this as an aspersion upon the argument. There may have been another explanation. The confession was taken before "Mr. Mayor." *White*, 17 Howell's State Trials at 1085. Now, it is possible that the magistrate's surname was "Mayor," but it seems more likely that the confession was taken before the Mayor of the City of Bristol. That person, however, was also one of the judges at *White's* trial. *Id.* at 1003. Consequently, the recorder's riposte may have had only the purpose of protecting a colleague.

²⁷⁵ 2 DEBATES IN PARLIAMENT 123 (London, J. Stockdale, Samuel Johnson ed., 1787).

statement is the third strand in the development of the involuntariness rule. If he intended to refer to a guilty plea, his statement is merely a latter-day version of Staundiford's, and thus only an indirect antecedent of the involuntariness rule. In either event, however, Carteret, in common with Hudson and the defense lawyer in *Mico*, did not regard *nemo tenetur* as separate from the requirement that a "confession" be voluntary. To the contrary, the doctrine that "no man can be obliged to accuse himself" meant that a confession had to be "voluntary and unconstrained." *Nemo tenetur* was, therefore, the source of the requirement of voluntariness.

The fourth strand in the development of the involuntary confession rule is a section editorially added to a treatise on the law of evidence written by Lord Chief Baron Geoffrey Gilbert, and published posthumously in 1754.²⁷⁶ While discussing the disqualification of witnesses for interest, the author wrote the following:

5thly, As Persons interested are utterly removed from being Evidence for want of Integrity, so on the other Side the voluntary Confession of the Party in Interest is reckoned the best Evidence; for if a Man's swearing for his Interest can give no Credit, he must certainly give most Credit when he swears against it; but then this Confession must be voluntary and without Compulsion; for our Law differs from the Civil Law, that it will not force any Man to accuse himself; and in this we do certainly follow the Law of Nature, which commands every Man to endeavor his own Preservation; and therefore Pain and Force may compel Men to confess what is not the Truth of Facts, and consequently such extorted confessions are not to be depended upon.²⁷⁷

This passage raises two principal questions. The first is whether the author was addressing confessions made outside the trial court or whether he was referring to guilty pleas only. Wigmore, who insisted that the involuntary confession rule did not arise until the late 1700s,²⁷⁸ says that this passage "was apparently intended to apply only to 'confessions' in the old pleading sense

²⁷⁶ SIR GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 121-47 (London, His Majesty's Law Printers 1769). The earliest complete edition available to me for hands-on use was the 1769 edition. However, I have been informed by the Reference Department of the Law Library of The Ohio State University College of Law that the crucial passage relating to confessions appears for the first time in the 1754 edition. That information was backed up by facsimile pages from the 1754 edition. The passage does not appear in the 1717 edition, which is the only one that was published before Gilbert's death in 1726. Hence, as with Hale, the passage was apparently added by an editor. I say "apparently" because the title page of the 1754 edition says, "And now first Publish'd from an Exact Copy taken from the Original Manuscript." If the crucial passage was really written by Baron Gilbert, it is the first strand in the development of the involuntariness rule.

²⁷⁷ *Id.* at 139-40.

²⁷⁸ 3 WIGMORE, *supra* note 80, § 818, at 294.

already described,"²⁷⁹ that is, guilty pleas. However, Wigmore gives no reasons, and the text hardly supports him. Moreover, the passage appears in an evidence treatise, not in a book on procedure; it is part of a discussion of the admissibility of testimony of interested witnesses, not a discussion of pleading; immediately preceding the passage is a discussion of the *admissibility* of the testimony of an uncharged co-conspirator;²⁸⁰ and immediately following it is a discussion of the evidentiary effect of a confession obtained by a JP's examination and the *admissibility* at trial of written statements obtained from witnesses at preliminary proceedings.²⁸¹ Hence, it is completely inconsistent with context to say that the passage in question deals with guilty pleas rather than confessions. Considered in context, it is more likely that the passage was intended to deal generally with the admissibility of confessions made outside the trial court.²⁸²

The second question is why the author regarded an involuntary confession as inadmissible. His opaque writing suggests two reasons. The first, which is quite different from Emlyn's edition of Hale, is that an involuntary confession contravenes the *nemo tenetur* maxim. This reason links the two doctrines (*nemo tenetur* is the *justification* for excluding involuntary confessions) and thus confers on the exclusion of involuntary confessions the values underlying the protection against compulsory self-incrimination. The second reason, which is closer to Emlyn, seems to be that both *nemo tenetur* and the exclusion of involuntary confessions serve an additional function: guarding against unreliable confessions.

Linking the exclusion of involuntary confessions to *nemo tenetur* is reminiscent of the ambiguous statements in Hudson's treatise²⁸³ and the argument made in *Mico* in which the defense counsel linked the involuntary-plea rule to *nemo*.²⁸⁴ As noted above, the *Mico* argument appeals to logic.²⁸⁵

²⁷⁹ *Id.* at 296.

²⁸⁰ GILBERT, *supra* note 276, at 139.

²⁸¹ *Id.* at 140-41.

²⁸² Wigmore himself seems to recognize this in a subsequent section of his work. Ignoring his earlier statement that Gilbert had written about guilty pleas rather than confessions, *supra* text accompanying note 279, he stated, "Probably . . . early in historical usage and more common in modern judicial opinions, is the phrase 'voluntary,' as indicating that quality in a confession which sanctions its reception." 3 WIGMORE, *supra* note 80, § 826, at 347-48 n.1. In support of this statement, he cites the passage from Gilbert quoted in the text of this Article. *Id.*

²⁸³ See *supra* notes 243-48 and accompanying text.

²⁸⁴ At page 139 of the 1769 edition of Gilbert's treatise, there are a number of citations in the margin, most of which pertain to the disqualification of an interested witness. One of the citations, however, concerns *nemo tenetur*. "Hard. 139, 140" refers to cases collected by Sir Thomas Hardres. At pages 139 and 140 of his collection appears the *Mico* case. See *supra* notes 249-54 and accompanying text. It is clear from this reference that the author of the passage in Gilbert intended to rely on *nemo tenetur* as a justification for

So does the linkage in Gilbert. If *nemo* prohibits *trying to obtain* incriminating statements from the accused or a witness by jailing or threatening to jail the person or by using or threatening to use some other coercive measure such as force, then *nemo* should also prohibit *actually obtaining* the statement by coercion and *using* it.²⁸⁶

The fifth strand in the development of the rule barring the admissibility of involuntary confessions occurred in 1775 in *Rudd's Case*,²⁸⁷ a complicated matter in which references to the admissibility of a confession were *obiter dicta*. Ms. Rudd filed a complaint charging the brothers Perreau with forcing her to forge a bond. She sought to take advantage of a discretionary practice in which an accomplice might receive a pardon after making a full confession that led to the conviction of the principal. Subsequently charged herself, she sought bail, apparently to facilitate applying for the pardon.

A third ground which has been urged in support of the present application [for bail] is this; that the prisoner has been drawn in by promises and assurances [from Justices of the Peace] to answer to an examination, and to swear to it on oath, which she would not have done, but from a confidence that those promises and assurances would have been kept and performed. *The instance has frequently happened, of persons having made confessions under threats or promises: the consequence as frequently has been, that such examinations and confessions have not been made use of against them on their trial.*²⁸⁸

Later in his opinion, Lord Chief Justice Mansfield said:

I agree with [defense counsel], that if she had made a fair and full disclosure of all that she knew, and the Justices had deceived her, under a promise or

excluding involuntary confessions, just as counsel in *Mico* relied on *nemo tenetur* to attack involuntary pleas.

²⁸⁵ See *supra* text accompanying notes 252–53.

²⁸⁶ In his recent article, Professor Benner says, and decries, that the sole effect of the passage from Gilbert is to limit the rationale of *nemo tenetur* to the concern for reliability that underlies the involuntary confession rule. See Benner, *supra* note 246, at 95–97. Although this interpretation is not implausible, it certainly is not compelled by the ambiguous words of the passage. Moreover, the *nemo tenetur* doctrine was firmly embedded in English law and interpreted generously long before the passage was written. Nothing in Gilbert's treatise indicates an aversion to the doctrine or its interpretation. Consequently, it is more plausible to read the passage as conferring on the confession rule the broader values underlying the privilege. Alternatively, we might read the passage as conferring on *nemo tenetur* a concern for reliability *in addition to* the other values served by the privilege. Later in this article, I shall try to develop the point that the privilege serves a complex of values *including* reliability. See *infra* notes 440–47 and accompanying text.

²⁸⁷ 1 Leach 115, 168 Eng. Rep. 160 (K.B. 1775).

²⁸⁸ *Id.* at 117–18, 168 Eng. Rep. at 161 (emphasis added).

assurance or hope of a pardon from them, she would be entitled to a recommendation of mercy: and in that case I should have been of opinion to bail her, though the Justices had in strictness no right to make such a promise, or give her such assurance. *If any evidence or confession has been extorted from her, it will be of no prejudice to her on the trial.*²⁸⁹

These passages intimate, without explicitly saying, that involuntary confessions were regarded in 1775 as inadmissible, and that such confessions had in fact been excluded. They do not state why involuntary confessions are inadmissible, and they certainly do not attribute inadmissibility to the *nemo tenetur* doctrine. Moreover, in common with the recorder's statement in *White*,²⁹⁰ they refer to promises, as well as threats, as a source of inadmissibility. However, a concern that a confession not be induced by promises does not neatly correspond to one's intuitive notion of what a stricture against compulsory self-incrimination is supposed to prohibit. Hence, both *Rudd* and *White* may in part impliedly contradict Gilbert's notion of a relationship between the inadmissibility of involuntary confessions and the *nemo tenetur* doctrine. On the other hand, neither *Rudd* nor *White* explicitly addresses the relationship between *nemo* and the exclusion of confessions, and nothing in either opinion indicates that *nemo* is intrinsically inapplicable to confessions that are made outside the trial court. Consequently, *Rudd* and *White* cannot be taken as having settled any of the matters with which we are concerned, and they remain open for further inquiry.²⁹¹

The sixth and final strand in the development of the rule barring involuntary confessions occurred eight years later in the case of *Rex v. Warickshall*.²⁹² Suspected of having received stolen property, Warickshall confessed after receiving "promises of favour."²⁹³ Her confession led the authorities to the property, which was hidden in her bed. After the court refused to admit Warickshall's confession against her, the prosecutor offered the derivative evidence—the property and the fact that it had been found in her bed. Warickshall's lawyer argued that unless the fruits of the confession were also excluded, "the faith which the prosecutor had pledged would be violated,

²⁸⁹ *Id.* at 122–23, 168 Eng. Rep. at 164 (emphasis added).

²⁹⁰ Trial of Charles White, 17 Howell's State Trials 1079 (1741).

²⁹¹ Whether the exclusion of involuntary confessions is attributable to the *nemo tenetur* doctrine or is independent of it is discussed *infra* at notes 453–66 and accompanying text. Whether the protection against compulsory self-incrimination is offended when a confession is induced by a promise that is subsequently broken is discussed *infra* at notes 454–63 and accompanying text.

²⁹² 1 Leach 263, 168 Eng. Rep. 234 (K.B. 1783).

²⁹³ *Id.* at 263, 168 Eng. Rep. at 234. The promises were apparently made by the victim. Although the opinion does not disclose what was promised, I infer that the victim promised not to prosecute Warickshall if she returned the stolen property.

and the prisoner made the deluded instrument of her own conviction."²⁹⁴ The court, however, admitted the derivative evidence.

It is a mistaken notion, that the evidence of *confessions and facts* which have been obtained from prisoners by *promises or threats*, is to be rejected from a regard to *public faith*: no such rule ever prevailed. The idea is novel in theory, and would be as dangerous in practice as it is repugnant to the general principles of criminal law. Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not intitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt . . . but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it; and therefore it is rejected. This principle respecting confessions has no application whatever as to the admission or rejection of *facts*, whether the knowledge of them be obtained in consequence of an extorted confession, or whether it arise from any other source . . .²⁹⁵

Warickshall is the clearest indication that an involuntary confession is inadmissible, for *Warickshall*'s confession was in fact excluded from evidence. The basis for exclusion is said to be the putative unreliability of an involuntary confession rather than "public faith," which, I suppose, refers to the public's faith or hope that persons in authority will keep the promises by which they induce confessions. The opinion contains no reference to the *nemo tenetur* maxim and there is assuredly no indication that involuntary confessions are excluded because they offend the maxim, even in a case involving force or the threat of force. Indeed, the court's intimation that unreliability is the sole basis for excluding any confession, whether obtained by threats or promises, might be regarded as contradicting that notion. On the other hand, as was true in *Rudd* and *White*, the court does not address the relationship between the exclusion of confessions and *nemo*, and the opinion certainly does not state that *nemo* is inherently inapplicable to confessions that are made outside the trial court. Moreover, as in *Rudd*, we would not necessarily expect to find a reference to *nemo* in a case that involved promises rather than force or threat of force. Consequently, none of the cases answers the question whether there is a relationship between the exclusion of involuntary confessions and the *nemo tenetur* doctrine.

Warickshall was decided in 1783. During the next two years, the courts occasionally confronted similar issues, resolving them as they had been resolved in *Warickshall*.²⁹⁶ In none of the cases did the court discuss the

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 263-64, 168 Eng. Rep. at 234-35.

²⁹⁶ In chronological order, the cases are *Rex v. Thompson*, 1 Leach 291, 168 Eng. Rep. 248 (1783) (interrogator implied that suspect would not be prosecuted if he gave a

relationship between *nemo* and the inadmissibility of involuntary confessions. Nor did the court discuss whether *nemo* is applicable to interrogations occurring outside the trial court. Indeed, in none of the cases did the court even mention *nemo*. These cases, too, leave unsettled the applicability of *nemo* to pretrial interrogation and the relationship between *nemo* and the exclusion of involuntary confessions.

The English cases from 1785 to the mid-19th century shed little light on these issues.²⁹⁷ The *nemo tenetur* doctrine prospered, and courts refused to compel incriminating answers in both civil and criminal matters.²⁹⁸ If an incriminating statement was made, objection to its admissibility in a criminal proceeding on the ground that it was involuntary was virtually a matter of routine,²⁹⁹ and the objection was often sustained.³⁰⁰ In only a few of the

satisfactory exculpatory explanation); *Rex v. Mosey*, 1 Leach at 265 n.(a), 168 Eng. Rep. 235 n.(a) (1784) (promise of favor invalidated confession; derivative evidence admissible); *Rex v. Cass*, 1 Leach 293 n.(a), 168 Eng. Rep. 249 n.(a) (1784) (promise of favor invalidated confession); *Rex v. Lockhart*, 1 Leach 386, 168 Eng. Rep. 295 (1785) (promise of favor invalidated confession; testimony of derivative witness admissible). All of the cited cases were tried at London's Central Criminal Court (the Old Bailey).

²⁹⁷ My principal concerns in writing this Article are to ascertain whether there is a relationship between the rule barring the admissibility of involuntary confessions and the protection against compulsory self-incrimination, and to determine whether the latter should be applicable to police interrogations. I am particularly interested in whether the inadmissibility of involuntary confessions is based, even in part, on the protection against compulsory self-incrimination. In the United States, both doctrines are customarily thought of as constitutional law doctrines, although both originated in the common law. One may wonder why, in exploring the relationship between these two doctrines of American constitutional law, I am referring to English legal materials that arose long after the adoption of the Fifth Amendment. The answer is that those materials *may* illuminate the thinking of earlier generations on both sides of the Atlantic.

²⁹⁸ See, e.g., *Cartwright v. Green*, 8 Ves. Jun. 405, 32 Eng. Rep. 412 (Ch. 1802-1803) (demurrer to petition for discovery sustained on ground that respondent's answer would be self-incriminating with reference to criminal conversion of mislaid money); *Maloney v. Bartley*, 3 Camp. 210, 212, 170 Eng. Rep. 1357, 1385 (Oxford Cir. 1812) (magistrate's sub-clerk cannot be compelled to state whether he wrote a libelous affidavit; answer would "tend to criminate the witness"); *The King v. England*, 2 Leach 767, 168 Eng. Rep. 483 (Cent. Crim. Ct. 1796) (second in duel was not compelled to testify for prosecution).

²⁹⁹ A large collection of the cases may be found in 3 WIGMORE, *supra* note 80, §§ 817-50 *passim*.

³⁰⁰ The following chronological list is not exhaustive: *Rex v. Wilson* 597, 1 Holt, 171 Eng. Rep. 353 (C.P. 1817) (magistrate's examination—as opposed to magistrate merely asking whether the suspect has anything to say—implies an obligation to answer); *Rex v. Kingston*, 4 Car. & P. 387, 172 Eng. Rep. 752 (Norfolk Cir. 1830) (statement that it would be "better" for the suspect to confess, *i.e.*, that the suspect could obtain some advantage by confessing); *Rex v. Dunn*, 4 Car. & P. 543, 172 Eng. Rep. 817 (Oxford Cir. 1831) (same);

confession cases, however, did the defense lawyer even refer to *nemo tenetur*.³⁰¹ In fewer still did he assert that *nemo tenetur* was the basis for excluding an involuntary confession.³⁰² The cases do establish that *nemo tenetur* is applicable to pretrial examinations conducted by magistrates,³⁰³ but they are otherwise unilluminating. One may infer from some of the cases that at least some involuntary confessions were excluded at trial because they offended *nemo tenetur*, but none of the cases contains a straightforward discussion of the

Rex v. Parratt, 4 Car. & P. 570, 172 Eng. Rep. 829 (Oxford Cir. 1831) (threat by captain to have crew member committed and executed if he did not confess); Rex v. Richards, 5 Car. & P. 318, 172 Eng. Rep. 993 (Oxford Cir. 1832) (threat that constable would take suspect to a magistrate if the suspect did not confess; also construed as a promise of forbearance); Rex v. Cooper, 5 Car. & P. 535, 172 Eng. Rep. 1087 (Oxford Cir. 1833) (magistrate promised to do all he could for suspect); Rex v. Enoch, 5 Car. & P. 539, 172 Eng. Rep. 1089 (Oxford Cir. 1833) (suspect told it would be "better" to confess); Rex v. Davis, 6 Car. & P. 177, 172 Eng. Rep. 1196 (Oxford Cir. 1833) (prisoner apparently examined on oath); Rex v. Lewis, 6 Car. & P. 161, 172 Eng. Rep. 1190 (Oxford Cir. 1833) (magistrate examined prisoner on oath); Rex v. Mills, 6 Car. & P. 146, 172 Eng. Rep. 1183 (Oxford Cir. 1833) (officer refused to accept suspect's denial, told suspect there were eye witnesses); Rex v. Thomas, 6 Car. & P. 353, 172 Eng. Rep. 1273 (Oxford Cir. 1834) ("better" to confess); Rex v. Simpson, 1 Mood. 410, 168 Eng. Rep. 1323 (Cr. Cas. Res. 1834) (promise not to prosecute); Rex v. Upchurch, 1 Mood. 465, 168 Eng. Rep. 1346 (Cr. Cas. Res. 1836) (promise to spare suspect's life if he confessed); Queen v. Garbett, 2 Cox Crim. Cas. 448 (Ex. 1847) (witness in civil case was ordered to answer incriminating questions, presumably on threat of jail).

³⁰¹ See Queen v. Garbett, 2 Cox Crim. Cas. (Ex. 1847); Rex v. Gilham, 1 Mood. 186, 168 Eng. Rep. 1235 (Cr. Cas. Res. 1828); Rex v. Enoch, 5 Car. & P. 539, 172 Eng. Rep. 1089 (Oxford Cir. 1833).

³⁰² See Reg. v. Scott, 1 Dears. & Bell 47, 51, 169 Eng. Rep. 909, 911 (Cr. Cas. Res. 1856) ("[T]he common law principle [is] that a man is not bound to criminate himself, and that whatever he says in the nature of admission or confession must be voluntary to be admissible."). This suggests that the involuntariness rule is *nemo tenetur*'s exclusionary rule. See *infra* notes 453-54 and accompanying text.

³⁰³ See Rex v. Gilham, 1 Mood. 186, 191-92, 168 Eng. Rep. 1235, 1237 (Cr. Cas. Res. 1828) (magistrate advised suspect that he did not have to make a statement); *id.* at 203, Eng. Rep. at 1241 (concession by prosecution that examination of suspect on oath by magistrate would violate *nemo tenetur*); Rex v. Walter, 7 Car. & P. 267, 173 Eng. Rep. 118 (Norfolk Cir. 1836) (suspect declined to testify at examination); Rex v. Haworth, 4 Car. & P. 254, 172 Eng. Rep. 693 (Northern Cir. 1830) (suspect made incriminating statement at examination; statement held admissible on ground that suspect could have objected at the examination, but did not); see also Reg. v. Sloggett, 7 Cox Crim. Cas. 139 (Eng. Crim. App. 1856) (same; statement made at bankruptcy examination); Queen v. Garbett, 2 Cox Crim. Cas. 448 (Ex. 1847) (statement unlawfully compelled at bankruptcy examination inadmissible in subsequent criminal trial).

issue.³⁰⁴ Nor does any case discuss whether *nemo* is applicable to questioning by the police, an important issue which we must eventually confront.

The treatises of the late-18th to mid-19th centuries are only slightly more illuminating than the cases.³⁰⁵ All of the cited works discuss the rule excluding involuntary confessions; most of them also have a *separate* discussion of the *nemo tenetur* doctrine.³⁰⁶ Regarding involuntariness, all of the cited works are concerned with confessions as opposed to guilty pleas, and with admissibility as opposed to weight.³⁰⁷ Those that discuss the issue say that the exclusion of

³⁰⁴ The cases from which an inference may be drawn include all of the cases cited in the preceding note except *Rex v. Walter*. Also included is *Rex v. Wilson*, 1 Holt 597, 171 Eng. Rep. 353 (C.P. 1817). Of the cases cited in the preceding note, *Garbett* most clearly supports the inference that a compelled confession is inadmissible by virtue of the *nemo tenetur* doctrine itself rather than by force of some independent requirement of voluntariness.

³⁰⁵ Among the sources I consulted, are the following, listed in chronological order: 1 RICHARD BURN, JUSTICE OF THE PEACE (London, A. Strahan, John Burn ed., 1797) [hereinafter BURN I]; 2 EDWARD H. EAST, PLEAS OF THE CROWN (London, A. Strahan 1803); 1 LEONARD MACNALLY, EVIDENCE (Philadelphia, P. Byrne 1804); 1 CHITTY, *supra* note 128; S. M. PHILLIPS, EVIDENCE (New York, Gould, Banks & Gould 1816) [hereinafter PHILLIPS I]; 1 & 2 THOMAS STARKIE, EVIDENCE (London, J & W.T. Clarke 1824); 2 WILLIAM HAWKINS, PLEAS OF THE CROWN (London, Sweet; Pheney; Maxwell; and Stevens & Sons, 8th ed. 1824); 1 S. MARCH PHILLIPS, EVIDENCE (London, A. Strahan, 7th ed. 1829) [hereinafter PHILLIPS II]; HENRY H. JOY, ADMISSIBILITY OF CONFESSIONS (Philadelphia, John S. Littell 1843); 1 & 2 RICHARD BURN, JUSTICE OF THE PEACE (London, Sweet; Maxwell & Son; and Stevens & Norton, 29th ed. 1845) [hereinafter BURN II]; 2 SIR WILLIAM O. RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS (Philadelphia, T. & J.W. Johnson, 5th Am. ed. 1845); 1 JOHN P. TAYLOR, EVIDENCE (London, A. Maxwell & Son 1848). I also consulted a few sources published during the second half of the 19th century: JAMES F. STEPHEN, DIGEST OF THE LAW OF EVIDENCE (London, MacMillan 1876) [hereinafter STEPHEN, DIGEST]; 1 STEPHEN, HISTORY, *supra* note 81.

³⁰⁶ 1 BURN I, *supra* note 305, at 451 (involuntary confessions), 654 (*nemo tenetur*); 1 BURN II, *supra* note 305, at 868-76 (involuntary confessions); 2 *id.* at 454-56 (*nemo tenetur*); 1 CHITTY, *supra* note 128, at 570-72 (involuntary confessions), 620-21 (*nemo tenetur*); 2 HAWKINS, *supra* note 305, at 594-95 (involuntary confessions), 604 (*nemo tenetur*); MACNALLY, *supra* note 305, at 37-52 (involuntary confessions), 256-61 (*nemo tenetur*); PHILLIPS I, *supra* note 305, at 80-83 (involuntary confessions), 205-08 (*nemo tenetur*); 1 PHILLIPS II, *supra* note 305, at 110-19 (involuntary confessions), 276-84 (*nemo tenetur*); 2 RUSSELL, *supra* note 305, at 824-71 (involuntary confessions), 925-31 (*nemo tenetur*); 1 STARKIE, *supra* note 305, at 105-06 (*nemo tenetur*); 2 *id.* at 48-54 (involuntary confessions); STEPHEN, DIGEST, *supra* note 305, at 28-31, 145-46 (involuntary confessions), 117-18 (*nemo tenetur*); 1 STEPHEN, HISTORY, *supra* note 81, at 446-47 (involuntary confessions), 342, 440 (*nemo tenetur*); 1 TAYLOR, *supra* note 305, at 579-98 (involuntary confessions), 969-77 (*nemo tenetur*).

³⁰⁷ See, e.g., 1 BURN I, *supra* note 305, at 451; 2 STARKIE, *supra* note 305, at 48, 51; 1 TAYLOR, *supra* note 305, at 582, 586.

putatively unreliable evidence is the reason for excluding involuntary confessions.³⁰⁸

Regarding *nemo tenetur*, those that discuss the issue treat the doctrine as applicable to examinations by magistrates.³⁰⁹ However, none of the cited works discusses whether *nemo tenetur* is applicable to questioning by the police.

Only one work directly addresses the crucial question of whether the rule that makes involuntary confessions inadmissible comes from the *nemo tenetur* doctrine or is independent of it. Taylor's treatise on evidence states:

Though torture was thus formally abolished before the middle of the seventeenth century, it was not till after the lapse of many years that the common law doctrine, *nemo tenetur prodere seipsum*, was duly recognised, or at least was interpreted to mean, as it does in the present day, that all confessions should be strictly *voluntary*. . . .³¹⁰

Taylor quite clearly does not see the two doctrines as distinct. Rather, *nemo tenetur* is the source of the involuntariness rule. However, Taylor cites no authority for his position, ignoring the support that Gilbert's treatise might have provided.

None of the remaining works directly addresses the question of whether there is a relationship between the two doctrines. A few, however, suggest by indirection that there is a relationship. MacNally states that a purpose of *nemo tenetur* is to outlaw torture;³¹¹ that the stricture against torture serves the goal of reliability;³¹² and that the exclusion of involuntary confessions serves the same goal.³¹³ Thus, he perceives the doctrines as functionally equivalent. Chitty's treatise discusses the doctrines in the same breath, as though they were parts of the same whole.³¹⁴ Finally, Starkie's treatise, in the course of a discussion of the involuntariness rule, states that "[t]he prisoner is not to be examined [by the magistrate] upon oath for this would be a species of duress, and a violation of the maxim, that no one is bound to criminate himself."³¹⁵ None of these sources, it should be noted, cites any authority for suggesting a relationship between the two doctrines.

³⁰⁸ See, e.g., 1 CHITTY, *supra* note 128, at 85; 2 RUSSELL, *supra* note 305, at 824.

³⁰⁹ See, e.g., 1 CHITTY, *supra* note 128, at 84-85; 1 TAYLOR, *supra* note 305, at 598-99, 607.

³¹⁰ 1 TAYLOR, *supra* note 305, at 599.

³¹¹ MACNALLY, *supra* note 305, at 275.

³¹² *Id.*

³¹³ *Id.* at 42, 44, 47.

³¹⁴ 1 CHITTY, *supra* note 128, at 84.

³¹⁵ 2 STARKIE, *supra* note 305, at 52.

Taken as a whole, the cases and treatises up to 1850 do not settle the question of whether the involuntariness rule and *nemo tenetur* are separate and distinct doctrines in English law.³¹⁶ Nor do they even address the question of whether *nemo tenetur* is applicable to police interrogation. These questions, therefore, remain open for speculation and debate.

H. America

1. Compelled Self-Incrimination

In the colonies and states, the story of the right against compulsory self-incrimination and the rule barring involuntary confessions is not the story of a single jurisdiction, as in England, but of many. However, relatively little is known about legal history in any colony, a phenomenon caused in part by the fact that colonial cases were not published and other printed materials were sparse.³¹⁷

The earliest recorded suggestion that compulsory self-incrimination might be improper occurred in 1637 in Massachusetts, "where Puritan statecraft, religion, and intolerance could be practiced in a way never possible in England."³¹⁸ As a result of his unorthodox religious views, minister John Wheelwright was called for examination by the General Court, a colonial legislature which also exercised judicial authority. Having created a stir by loosely using the words "ex officio," the Court hastened to assure Wheelwright that he would not be examined "by any compulsory means, as by oath, imprisonment, or the like."³¹⁹ Later, Deputy-Governor John Winthrop told a recalcitrant Wheelwright that a particular question was not intended "to draw matter from himself whereupon to proceed against him."³²⁰ The reactions of the Court and Winthrop show an awareness of the English struggle for a right against compulsory self-incrimination.

³¹⁶ The same is true of later materials. Judge Stephen sees the involuntariness doctrine as beginning with a stricture against torture. 1 STEPHEN, HISTORY, *supra* note 81, at 447. He also says that the *nemo tenetur* maxim "condemned the practice of torture." *Id.* at 440. Thus, he sees a link between the two doctrines, but he does not explore it. In his *Digest of the Law of Evidence*, Stephen treats the case of Queen v. Garbett, 2 Cox Crim. Cas. 448 (Ex. 1847), as involving an involuntary confession. STEPHEN, DIGEST, *supra* note 305, at 31. By contrast, Wigmore treats the same case as involving a violation of the *nemo tenetur* maxim. 3 WIGMORE, *supra* note 80, § 850, at 519. This suggests that, at the very least, the two doctrines have overlapping coverage, even if they are separate.

³¹⁷ LEVY, *supra* note 13, at 334-35.

³¹⁸ *Id.* at 339-40.

³¹⁹ *Id.* at 342.

³²⁰ *Id.*

The maxim *nemo tenetur seipsum prodere* was used as early as 1642 in Massachusetts and a bit later in other colonies.³²¹ As in England, it was used more in connection with the proceedings of prerogative courts than of common law courts,³²² and its invocation served a variety of functions. It was used to ward off perceived religious oppression,³²³ was a response to efforts to conduct on-oath examinations,³²⁴ and was a way of insisting that a person should not be subjected to the bother of an examination unless charged by a known accuser.³²⁵ It was also a way of saying that torture was unlawful;³²⁶ thus, the maxim served the additional function of avoiding unreliable evidence.³²⁷

Although the maxim was known in the colonies, its assertion was honored as often in the breach as in the observance.³²⁸ "As the seventeenth century closed, the right against self-incrimination was uncertainly founded in America,"³²⁹ but the eighteenth century brought changes. In 1735, Benjamin Franklin characterized it as one of the "common Rights of Mankind."³³⁰ As time passed, English law books touting the wisdom of the right became available in some of the colonies.³³¹ Although "[t]he record remains incomplete . . . there is now sufficient evidence to establish the claim that the right was well known to the average colonist by the early 1770s. Indeed, colonies and motherland differed little if at all on the right by 1776."³³²

After the Revolution, the protection against compulsory self-incrimination took on a new dimension. Previously a common law right, it became

³²¹ See *id.* at 346–47 (Massachusetts), 357 (New York), 359 (Pennsylvania).

³²² See *id.* at 367, 377, 379–80.

³²³ See *id.* at 351, 357.

³²⁴ See *id.* at 346, 347, 353, 358, 378, 381–82.

³²⁵ See *id.* at 341, 360–61.

³²⁶ See *id.* at 345, 354–55.

³²⁷ See *id.* at 347; see also *State v. Hobbs*, 2 Tyl. *382, *382–*83 (Vt. 1803) (dictum that state constitutional prohibition of compulsory self-incrimination prohibits torture and makes a torture-induced confession inadmissible because of its doubtful reliability).

³²⁸ The details are spelled out in LEVY, *supra* note 13, at 333–67.

³²⁹ *Id.* at 367.

³³⁰ *Id.* at 383. Franklin's characterization was in a losing cause. See *id.*

³³¹ See *id.* at 371–72. Professor Levy's reference is to Baron Gilbert's treatise on evidence, which was in the possession of a New York lawyer in 1753. That treatise, it will be remembered, regarded *nemo tenetur* as the source of the inadmissibility of involuntary confessions. See *supra* notes 282–86 and accompanying text. The availability of Gilbert's treatise on this side of the Atlantic meant that at least some colonial lawyers had to have an inkling of the inadmissibility of involuntary confessions decades before prohibitions against compulsory self-incrimination were put into state constitutions and the Federal Bill of Rights.

³³² Milton Cantor, Book Review, 117 U. PA. L. REV. 498, 506 (1969) (reviewing LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* (1968)). See LEVY, *supra* note 13, at 404.

constitutionalized. "[E]very state having a separate bill of rights protected the right against self-incrimination."³³³ On September 15, 1791, ratification of the federal bill of rights was completed and a prohibition of compulsory self-incrimination became a part of the Fifth Amendment to the United States Constitution. Patrick Henry made one of the arguments in favor of constitutionalization: without a constitutional protection, Congress might introduce the practice of torture to obtain confessions.³³⁴

Early on, self-incrimination issues arose in both federal and state cases. As in England during the same period, the protection was held applicable to magistrates' examinations,³³⁵ and in any setting it was given a generous interpretation.³³⁶ It is interesting to note that the cases did not involve

³³³ LEVY, *supra* note 13, at 412.

³³⁴ *See id.* at 418; *see also* ZECHARIAH CHAFEE, *THE BLESSINGS OF LIBERTY* 188 (1956).

³³⁵ *See* Trial of Northampton Insurgents (Fries' Case) (C.C.D. Pa. 1799), in FRANCIS WHARTON, *STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS* 458, 535 (Philadelphia, Carey & Hart 1849) (magistrate testified that it was his constant practice to advise prisoner "that he is not bound to be evidence against himself"); *State v. Harman*, 3 Del. (3 Harr.) 567 (1839-42) (suspect has the option of declining to sign a confession at magistrate's examination); *State v. Eaton*, 3 Del. (3 Harr.) 554 (Oyer & Term. 1840) (suspect refused to sign confession at magistrate's hearing); *William Goldsby's Case*, 1 City Hall Recorder (Rogers) 81, 82 (N.Y. Ct. Gen. Sess. 1816) (dictum that accused, examined by a police magistrate, has right to remain silent); JOHN C.B. DAVIS, *THE MASSACHUSETTS JUSTICE* 243 (Worcester, Warren Lazell 1847) (magistrate should advise prisoner "that he is not bound either to accuse himself, or confess his guilt"); WILLIAM W. HENING, *THE NEW VIRGINIA JUSTICE* 188 (Richmond, Johnson, 2d ed. 1810) (neither common law nor Virginia statutory law justifies examining a prisoner "in order to convict him"); RICHARD STARKE, *THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE EXPLAINED AND DIGESTED* 146 (Williamsburg 1774) (JP should not ask "any questions the answering to which might oblige [the prisoner] to accuse himself of a crime"); *see also* HUGH RANKIN, *CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA* 77 (1965) (prisoner was "allowed" to make a statement at preliminary examination); Kauper, *supra* note 122, at 1235-36 (attributes the waning of the magistrate's examination of the accused to the acceptance of the *nemo* principle).

³³⁶ *See* *United States v. Goosley*, 25 F. Cas. 1363 (C.C.D. Va. circa 1790) (No. 15,230) (court gratuitously protected witness against incriminating question); *Starr v. Tracy*, 2 Root 528 (Conn. Super. Ct. 1797) (impermissible to compel witness to testify against his *civil* interest); *Simons v. Payne*, 2 Root 406 (Conn. 1796) (same); *Vaughn v. Perrine*, 3 N.J.L. 299 (1811) (right protects against disclosure of matters that would dishonor or disgrace the witness); *State v. Bailly*, 2 N.J.L. 396 (Oyer & Term. 1807) (same); *Bellinger v. People*, 8 Wend. 595 (N.Y. Sup. Ct. 1832) (gratuitous protection of witness by trial court); *Hagerman's Case*, 3 City Hall Recorder (Rogers) 73 (N.Y. Ct. Gen. Sess. 1818) (same); *Galbreath v. Eichelberger*, 3 Yeates 515 (Pa. 1803) (privilege protects against disclosure that would dishonor or disgrace the witness); *Respublica v. Gibbs*, 3 Yeates 429 (Pa. 1802) (same).

jurisdictional disputes with prerogative courts, religious persecution, religious aversion to swearing, or secret accusation by unknown accusers. Rather, compulsory self-incrimination, unglossed by any collateral concern, was regarded as "cruel and unjust."³³⁷

2. Admissibility of Confessions

Tracing the development of the rule barring the admissibility of involuntary confessions is complicated by the paucity of materials relating to colonial America.³³⁸ It is reasonably clear, however, that colonial lawyers were aware of some of the antecedents of the English rule and some of the strands in the immediate development of that rule. The requirement that a plea of guilty be voluntary in order to displace the two-witness requirement as proof of treason was referred to in Pennsylvania cases in 1778 and 1781.³³⁹ Even before that era, however, colonial lawyers were using English treatises such as Hale and Gilbert that discussed a requirement of voluntariness.³⁴⁰ The first uniquely American reference I have found is Starke's manual for justices of the peace in Virginia. Published in 1774, it states, "And this examination being voluntary and sworn by the justice to be truly taken, may be given in evidence against the party confessing but not against others."³⁴¹

Notwithstanding statements in treatises, however, the earliest reported American cases show more concern for weight than for admissibility. For example, in *Commonwealth v. Dillon*,³⁴² the suspect's confession had been induced by promises and threats. Friends promised to help the suspect obtain a pardon if he confessed. Other persons, referred to in the opinion as "jail inspectors," threatened to confine him in a dungeon without food. The court submitted the confession to the jury with an instruction regarding weight. Apparently disbelieving the confession, the jury acquitted the defendant.³⁴³ A few years later, in *State v. Long*,³⁴⁴ the Superior Court of North Carolina took

³³⁷ *Respublica v. Gibbs*, 3 Yeates 429, 437 (Pa. 1802).

³³⁸ See *supra* note 317 and accompanying text.

³³⁹ *Respublica v. Roberts*, 1 Dall. *39 (Pa. 1778); *Respublica v. McCarty*, 2 Dall. 86 (Pa. 1781).

³⁴⁰ See JULIUS GOEBEL, JR. & T. RAYMOND MCNAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK* 284, 628 n.79, 642, 647-48 (1944); LEVY, *supra* note 13, at 370-72.

³⁴¹ STARKE, *supra* note 335, at 115.

³⁴² 4 Dall. 116 (Pa. 1792).

³⁴³ See also *State v. Moore*, 2 N.C. (1 Hayw.) *482 (Super. Ct. 1797). Private persons used force to obtain the defendant's confession which led to tangible evidence. Although the opinion is not clear, it appears that the court submitted the confession to the jury.

³⁴⁴ 2 N.C. (1 Hayw.) *456 (Super. Ct. 1797).

a small step in the direction of inadmissibility. Three days after a horse disappeared, two men brought the horse and Long to the owner. The men had apparently tried Long. In their presence, Long admitted stealing the horse. The men were not called as witnesses, a circumstance suspiciously suggesting that they had used force or threat to induce his confession. Although Long's confession was partially corroborated by the fact of the horse's absence, the court told the jury that the confession was uncorroborated and recommended an acquittal.

Although no American case had as yet squarely held an involuntary confession to be inadmissible, an 1803 manual for justices of the peace in New York, relying on Hale's treatise and *Warickshall*, flatly stated that a confession, "whether made upon an official examination, or in discourse with private persons, which is obtained from a defendant, either by the *promise of favor or by threats*, is not admissible evidence."³⁴⁵ Within a year came the first American case, *Commonwealth v. Chabbock*,³⁴⁶ holding inadmissible a confession that had been induced by the victim's "promise of favor."³⁴⁷ Three years after *Chabbock*, a New York court, in *People v. Rankin*,³⁴⁸ excluded a confession that had been induced by a police officer who said, "[I]f you do not tell all you know about the [poisoning], you will be put in the dark room and hanged." *Chabbock* and *Rankin* mark the case-law origin of the involuntary confession rule in the United States. By 1810, writers in Virginia and Connecticut regarded it as settled that a confession was inadmissible if obtained by promises or threats.³⁴⁹ Although a few courts occasionally submitted questionable confessions to juries,³⁵⁰ after 1810 it was a firmly accepted

³⁴⁵ ANONYMOUS, A NEW CONDUCTOR GENERALIS 152-53 (Albany, P. & S. Whiting 1803) [hereinafter CONDUCTOR GENERALIS].

³⁴⁶ 1 Mass. *144 (1804).

³⁴⁷ *Id.* *Chabbock* is the first American case I have found in which a confession was held inadmissible for any reason. *Chabbock* was preceded in Massachusetts by *Commonwealth v. Battis*, 1 Mass. *95 (1804), in which the court, before accepting a plea of guilty to capital rape, asked whether the plea had been induced by "promises, persuasions, or hopes of pardon." *Id.* at *96. Thus, the development of the involuntariness rule in Massachusetts mirrored the English development in that antecedent to both was a concern for the voluntariness of guilty pleas.

³⁴⁸ 2 Wheeler Crim. Cas. 467, 469 (N.Y. Oyer & Term. 1807). *Rankin* is the first American case I have found in which the involuntariness rule was applied to a confession obtained by a police officer.

³⁴⁹ WILLIAM W. HENING, NEW VIRGINIA JUSTICE 188-89 (Richmond, Johnson 1810); ZEPHANIAH SWIFT, DIGEST OF THE LAW OF EVIDENCE 131-32 (Hartford, Oliver D. Cooke 1810). Swift was a judge of the Connecticut Supreme Court. Both works cite only English authorities.

³⁵⁰ See *Stage's Case*, 5 City Hall Recorder (Rogers) 177 (N.Y. Ct. Gen. Sess. 1820) (threat by victim to have suspect jailed if he did not confess); *Bowerhan's Case*, 4 City Hall Recorder (Rogers) 136 (N.Y. Ct. Gen. Sess. 1819) (victim promised to intercede with

common law rule of evidence in the United States that a confession was inadmissible if obtained by a promise or threat.³⁵¹ Courts then began to refine the rule by resolving a variety of closer issues such as whether the

grand jury if suspect confessed); *Williams' Case*, 1 City Hall Recorder (Rogers) 149 (N.Y. Ct. Gen. Sess. 1816) (unspecified person threatened to jail suspect if he did not confess). In *Williams*, the jury acquitted the suspect. In the other two cases, the suspect was convicted, but it is impossible to tell whether the jury relied on the confession. These three cases may be the origin of the so-called "New York rule" which was held unconstitutional in *Jackson v. Denno*, 378 U.S. 368 (1964), on the ground that the jury could not be trusted to exclude from its consideration an involuntary, but believable, confession.

³⁵¹ In chronological order, the inadmissibility cases from 1810 through 1850 are *Jackson's Case*, 1 City Hall Recorder (Rogers) 28 (N.Y. Ct. Gen. Sess. 1816) (victim promised not to prosecute; confession inadmissible, but tangible property to which confession led, admissible); *State v. Aaron*, 4 N.J.L. *231 (1818) (saying to suspect that it would be better to tell the truth construed as a promise of benefit); *Thorn's Case*, 4 City Hall Recorder (Rogers) 81 (N.Y. Ct. Gen. Sess. 1819) (bank president promised embezzler that he would be allowed to turn state's evidence if he confessed); *Milligan's Case*, 6 City Hall Recorder (Rogers) 64 (N.Y. Ct. Gen. Sess. 1821) (victim promised not to prosecute); *United States v. Pocklington*, 27 F. Cas. 580 (C.C.D.C. 1822) (No. 16,060) (magistrate promised to try to get a light sentence for the suspect); *People v. Robertson*, 1 Wheeler Crim. Cas. 66 (N.Y. Recorder's Ct. 1822) (constable told suspect's wife it would be better if he confessed); *United States v. Richard*, 27 F. Cas. 798 (C.C.D.C. 1823) (No. 16,154) (unspecified promise; tangible evidence admissible); *State v. Roberts*, 12 N.C. (1 Dev.) *259 (1827) (promise that confession would be inadmissible); *State v. Guild*, 10 N.J.L. 163, 167 (1828) (promise that suspect "would probably get clear" and that it would be "better" to confess); *Hector v. State*, 2 Mo. 166 (1829) (torture by persons unconnected with case); *Commonwealth v. Knapp*, 27 Mass. (10 Pick.) 477 (1830) (dictum regarding confession made in hope of becoming state's witness); *State v. Brick*, 2 Del. (2 Harr.) 530 (Ct. Gen. Sess. 1835) (suspect told it would be better if he confessed; confession inadmissible, but tangible evidence admissible); *People v. Ward*, 15 Wend. 231 (N.Y. Sup. Ct. 1836) (magistrate said it would be better for suspect to confess); *State v. Phelps*, 11 Vt. 116 (1839) (shareholder of bank promised suspect favorable treatment); *Boyd v. State*, 21 Tenn. (2 Hum.) 39 (1840) (promise to try to induce victim to drop prosecution); *Peter v. State*, 7 Miss. (4 S. & M.) *31 (1844) (persons unconnected with case threatened to hang suspect); *State v. Bostick*, 4 Del. (4 Harr.) 563 (1845) (suspect's mistress promised that there would be no prosecution); *Commonwealth v. Harman*, 4 Pa. 269 (1846) (magistrate threatened to commit suspect and told her it would be better to tell the truth); *State v. Clarissa*, 11 Ala. *57 (1847) (slave whipped by owner); *State v. Nelson*, 22, 3 La. Ann. *497 (1848) (son of suspect's employer said it would be better to confess); *Couley v. State*, 12 Mo. *462 (1849) (police officer said that it would be better for the suspect to confess and that the officer would not divulge the confession); *Spence v. State*, 17 Ala. *192 (1850) (slave who had invariably been whipped for misconduct confessed after being tied and left with third person; held that trial court should have permitted defendant to prove that he had been whipped on prior occasions); *Commonwealth v. Taylor*, 60 Mass. (5 Cush.) 605 (1850) (police officer said he would try to help suspect).

administration of an oath was coercive;³⁵² whether an inducement made much earlier was still effective when the suspect confessed;³⁵³ whether, assuming the inadmissibility of the suspect's confession, a subsequent confession was also inadmissible;³⁵⁴ whether the promise emanated from a person in authority;³⁵⁵ and whether tangible evidence was admissible if discovered as a result of an inadmissible confession.³⁵⁶

The involuntariness rule was not narrow. As the cases synopsized in note 351 indicate, it applied to confessions obtained by magistrates, police officers, and even nongovernmental actors.³⁵⁷ Why were confessions excluded under this rule? Although many of the early cases ignored this question, it is clear that the overriding concern, as under the English rule, was that a confession might be false if induced by promises or threats.³⁵⁸

Whether the *nemo tenetur* doctrine also plays a part in the rationale of exclusion was indirectly addressed by two of the American cases. In *Commonwealth v. Drake*,³⁵⁹ the defendant confessed to fellow church members that he had committed an act of gross lewdness. Then he sought to exclude the confession from criminal proceedings on the ground that church discipline

³⁵² *State v. Broughton*, 29 N.C. (7 Ired.) *96 (1846) (administration of oath not coercive because witness had right to refuse to answer incriminating questions).

³⁵³ *State v. Potter*, 18 Conn. *166 (1846) (effect of inducement dissipated after several days).

³⁵⁴ *State v. Guild*, 10 N.J.L. 163, 167 (1828) (admissible); *Milligan's Case*, 6 City Hall Recorder (Rogers) 64 (N.Y. Ct. Gen. Sess. 1821) (admissible); *State v. Roberts*, 12 N.C. (1 Dev.) 259 (1827) (inadmissible).

³⁵⁵ *State v. Harman*, 3 Del. (3 Harr.) 567 (circa 1840).

³⁵⁶ The answer was invariably yes. See *United States v. Richard*, 27 F. Cas. 798 (C.C.D.C. 1823) (No. 16,154); *State v. Brick*, 2 Del. (2 Harr.) 530 (Ct. Gen. Sess. 1835); *Jackson's Case*, 1 City Hall Recorder (Rogers) 28 (N.Y. Ct. Gen. Sess. 1816).

³⁵⁷ The cases synopsized in note 351, *supra*, also indicate that the phenomenon of examination by a magistrate at a preliminary hearing was as established on this side of the Atlantic as in England. See also 3 HENING'S VA. STATS. AT LARGE 389-92 (New York, R. & W. & G. Bartow 1823) (1705 statute directed that justice of the peace should examine suspects); CONDUCTOR GENERALIS, *supra* note 345, at 152; STARKE, *supra* note 335, at 114; GEORGE H.F. WEBB, THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE 109 (1969 reprint) (1736). In early colonial times, long before the firm recognition of the *nemo tenetur* doctrine and the creation of the involuntariness rule, magistrates apparently used considerable pressure to induce suspects to confess, as they did in England. See LEVY, *supra* note 13, at 346-47, 355; Kauper, *supra* note 122, at 1224, 1235-36 (1932). By 1850, the practice of judicial examination had waned on both sides of the Atlantic. See Kauper, *supra* note 122, at 1233-34, 1236.

³⁵⁸ See, e.g., *State v. Grant*, 22 Me. 171 (1842). This concern also appears in decisions holding that tangible evidence is admissible even though derived from an involuntary confession. See also cases cited *supra* note 356; CONDUCTOR GENERALIS, *supra* note 345, at 152-53; DAVIS, *supra* note 335, at 242, 244, 245.

³⁵⁹ 15 Mass. *161 (1818).

enjoined upon him the obligation of confessing. The court held the confession voluntary and admissible, apparently accepting the Solicitor-General's argument which equated the absence of compulsion under *nemo tenetur* with voluntariness: "[N]o legal or constitutional principle was violated by the admission of the evidence objected to. The declaration of rights has provided that no subject shall be compelled to accuse or furnish evidence against himself. Here was no compulsion. The confession was purely voluntary."³⁶⁰ A similar equation appears in *State v. Broughton*.³⁶¹ Broughton testified under oath at a grand jury inquiry that another person had committed murder. Broughton's testimony also incriminated himself, and he was indicted. When the prosecutor tried to use his grand jury testimony against him at trial, Broughton objected on the ground that being placed under oath made his testimony involuntary. The court held that Broughton's answers were voluntary. He had a right not to answer incriminating questions even though he had been placed under oath. Consequently, the oath did not impair the voluntariness of his answers.³⁶²

Notwithstanding the equation in *Drake* and *Broughton* of the absence of compulsion under the *nemo tenetur* doctrine with voluntariness, in the confession-rule sense, it would be wrong to conclude that American courts saw a relationship between the two. Of the nearly forty reported cases involving the admissibility of confessions decided by American courts through 1850, *Drake* and *Broughton* are the only ones in which the equation is made. The remaining cases say nothing about whether *nemo tenetur* is the doctrinal basis for excluding involuntary confessions or whether exclusion is independently based.³⁶³ However, just as it would be inappropriate to base an argument solely on *Drake* and *Broughton*, so also would it be unwise to infer from the silence of most courts that a relationship was denied. Similarly, mere silence cannot suffice to establish that *nemo tenetur* was regarded as inapplicable to police interrogation. With reference to both questions, therefore, the American

³⁶⁰ *Id.* at *162.

³⁶¹ 29 N.C. (7 Ired.) *96 (1846).

³⁶² *Broughton* is similar both factually and in result to two English cases of the same era, *Rex v. Haworth*, 4 Car. & P. 253, 172 Eng. Rep. 694 (Northern Cir. 1830), and *Rex v. Sloggett*, 7 Cox Crim. Cas. 139 (Eng. Crim. App. 1856). The English cases are synopsized *supra* in the text accompanying note 303. The linkage in *Broughton* is also reminiscent of the statement in Gilbert's treatise. See *supra* text accompanying note 277.

³⁶³ In addition to the cases cited *supra* in notes 347, 348, 351, 354-55 and 357 see *Johnson's Trial*, 2 Am. St. Tr. 512 (N.Y. Ct. Oyer & Term. 1824) (suspect was made to touch deceased's body; subsequent confession held uncoerced); *State v. Cowan*, 29 N. C. (7 Ired.) *239 (1847) (magistrate truthfully said that he would have to commit suspect unless suspect could satisfactorily account for his possession of recently stolen property; held that the statement was not a threat); *State v. Moore*, 2 N.C. (1 Hayw.) *482 (Super. Ct. 1797) (confession obtained by force exerted by private persons; confession led to tangible evidence; confession submitted to jury).

cases through 1850 are like their English counterparts. They settle nothing and leave the crucial issues open to speculation and debate.

III. HISTORY AND BEYOND: IS THERE A RELATIONSHIP BETWEEN THE COMMON LAW EXCLUSION OF INVOLUNTARY CONFESSIONS AND THE COMMON LAW PROTECTION AGAINST COMPULSORY SELF-INCRIMINATION?

A. Introduction: Wigmore's Position

Dean Wigmore has made the strongest argument that the involuntary confession rule and *nemo tenetur* are distinct doctrines. Although recognizing some similarity between the two, he states in his discussion of confessions:

[A] confession is not rejected because of any connection with the *privilege against self-incrimination*. The circumstances that this privilege protects against a disclosure which is compulsory, and that one of the tests for a confession is whether it is voluntary or not, have naturally led to the occasional use of both arguments at once by counsel in opposing the use of such a confession; but the Courts have properly kept the two principles distinctly apart. Thus where a compulsory disclosure is offered, it may be admissible so far as the privilege against self-incrimination is concerned, and yet the question of its propriety as a confession may be raised [citing *R. v. Sloggett* . . .]; while it may be inadmissible on both grounds [citing *R. v. Garbett* . . .]. Moreover, where the privilege has been violated, there is no need of resorting to confessional principles to exclude it, since the theory of the privilege itself suffices to prevent the use of evidence obtained in consequence of such a violation. Finally, that the theory of confessions has no connection with the theory of this privilege is shown by the prevailing doctrine that testimony obtained by violation of the privilege cannot be objected to as such unless it is being used against the person thus disclosing. The sum and substance of the difference is that the confession rule aims to exclude self-criminating statements which are *false*, while the privilege-rule gives the option of excluding those which are *true*. The two are complementary to each other in that respect, and therefore cannot be coincident

That the two rules should be supposed to have something of a common spirit or principle is a not unnatural error. But that history should be rashly tampered with by asserting any common origin is inexcusable The history of the two rules . . . shows that there never was any historical connection or association between the constitutional clause and the confession-doctrine.³⁶⁴

³⁶⁴ 3 WIGMORE, *supra* note 80, § 823, at 337 n.2 (brackets and italics in original; some citations and textual cross-references omitted). The quoted passage, which appears in

Wigmore expands the attack in his discussion of compulsory self-incrimination:

The rule excluding confessions and the rule giving a privilege against compulsory testimonial self-incrimination are sometimes not kept plainly apart. This is natural enough, for . . . they [have] the common feature of an acknowledgement of guilty facts

That the *history* of the two principles is wide apart, differing by one hundred years in origin, and derived through separate lines of precedents, appears sufficiently from a survey of the two histories as already set forth. If the privilege, fully established in 1680, had sufficed for both classes of cases, there would have been no need in 1780 for creating the distinct rule about confessions.

So far as concerns *practice*, the two doctrines have not the same boundaries. The privilege covers only disclosures made under legal compulsion; the confessions rule covers statements made anywhere, including statements made in court. The confessions rule is broader, because it may exclude statements which are obtained by promises as well as by compulsion. Where the privilege is waived or not claimed, the confession rule may still operate to exclude. Where the privilege is nullified by statute (as it has been by the English Bankruptcy Act), the confession rule may still operate. Where the testimony, though given under oath, does not violate the confession rule, it may still involve a violation of the privilege. The privilege applies to witnesses as such, in civil and criminal cases, but the confession rule is concerned only with party defendants in criminal cases. A party defendant is protected by the confession rule against the use of his own statements only; but the privilege is applicable also to witnesses during his trial³⁶⁵

Wigmore's revisers have tempered his position in light of relatively recent developments, but even they maintain that Wigmore was historically correct. Thus, Professor Chadbourn, who revised the chapter on confessions, states that Wigmore's view, "while accurate as a summary of common-law theories, does not suffice as a synthesis of doctrines current today."³⁶⁶ Wigmore, Chadbourn continues, accurately concluded that there was no historical connection between the exclusion of confessions and *nemo tenetur*, but, as a result of *Miranda*, "it can no longer be said that a confession is not rejected because of any connection with the privilege against self-crimination."³⁶⁷ Professor

a footnote in the current edition, revised by Professor Chadbourn, is from Wigmore's third edition, 1940. The words are, therefore, Wigmore's, not Chadbourn's.

³⁶⁵ 8 WIGMORE, *supra* note 3, § 2266, at 400-01 (footnotes and textual cross-references omitted). The quoted passage is a slight revision by Professor McNaughton of what Dean Wigmore said in the third edition of his treatise. Cf. 8 WIGMORE, EVIDENCE § 2266, at 387-88 (3d ed. 1940).

³⁶⁶ 3 WIGMORE, *supra* note 80, § 823, at 338.

³⁶⁷ *Id.* at 340.

McNaughton, who revised the chapter on self-incrimination, states that the constitutionalization of the confession rule has spawned theories of exclusion that have nothing to do with putative unreliability. These theories "are quite similar to those underlying the privilege against self-incrimination,"³⁶⁸ and it is therefore understandable that the privilege has been invoked as a basis for excluding confessions. McNaughton, however, rues this development. Rather than using the privilege, he urges courts to exclude trustworthy confessions, if at all, only when the conduct that produced them is so egregious as to shock the conscience of the court and thus violate due process of law.³⁶⁹

I shall later discuss the constitutionalization of the confession rule in the United States and the effect of recent decisions.³⁷⁰ For the moment, however, I am interested only in whether Wigmore correctly concluded that the two common law doctrines have "no connection"³⁷¹ and that they should be kept "plainly"³⁷² and "distinctly apart."³⁷³ Although Wigmore compares the histories, operations, and objectives of the common law protections, his analysis is dominated by a comparison of operations. However, his emphasis is misplaced. That the protections operate differently does not necessarily establish that they have no connection. After all, even closely related rules may function in different ways. Because Wigmore's operational concerns are not necessarily crucial, I shall deal briefly with them at the outset and then turn my attention to Wigmore's rather stunted comparison of the histories and objectives of the common law protections.

B. Wigmore's Position Evaluated

1. Operations

"The privilege covers only disclosures made under legal compulsion; the confessions rule covers statements made anywhere, including statements made in court."³⁷⁴

Wigmore is really saying that the privilege does not apply to police interrogation, but the confession rule does. As he elsewhere puts the point, "Since police have no legal right to compel answers [by citing for contempt], there is no legal obligation to which a privilege in the technical sense can

³⁶⁸ 8 WIGMORE, *supra* note 3, § 2266, at 402.

³⁶⁹ *Id.* See also *id.* § 2184a, at 48-51 para. 2.

³⁷⁰ See *infra* Part IV.

³⁷¹ 3 WIGMORE, *supra* note 80, § 823, at 338 n.2.

³⁷² 8 WIGMORE, *supra* note 3, § 2266, at 400.

³⁷³ 3 WIGMORE, *supra* note 80, § 823, at 337 n.2.

³⁷⁴ 8 WIGMORE, *supra* note 3, § 2266, at 401.

apply.”³⁷⁵ Whether there is anything in the common law privilege that would make it inapplicable to police interrogation is an important question which I want to reserve for discussion later in this Article.³⁷⁶ Hence, I shall put it aside for the moment.

Wigmore may also be saying that the privilege protects only against official or governmental action, but the common law confession rule protects against the actions of private parties. This dichotomy implicates the objectives of both protections, a matter which I shall also discuss later in some detail.³⁷⁷

The privilege applies to witnesses as such, in civil and criminal cases, but the confession rule is concerned only with party defendants in criminal cases. A party defendant is protected by the confession rule against the use of his own statements only; but the privilege is applicable also to witnesses during his trial³⁷⁸

This argument is a sleight-of-hand trick that misrepresents the operations of both the privilege and the confession rule. The privilege is, *in the first instance*, a tool in the hands of a witness to fend off an interrogator (*i.e.*, to keep from answering a question or to avoid a punishment for not answering). Excluding evidence is but a *secondary function* of the privilege. On the other hand, the confession rule, in its *primary* operation, assumes the existence of a confession and inquires only into admissibility. Another way of putting the point is that the confession rule is primarily an exclusionary rule, but the privilege is not. From what I have just said, it follows that the principal effect of the privilege is to protect witnesses from compulsory self-incrimination in a variety of settings, both civil and criminal, when they reasonably fear that they will become defendants in criminal cases and their words will be used against them. Thus, the privilege protects *potential, criminal defendants*. The secondary effect of the privilege is to exclude evidence. Thus, the privilege protects *actual defendants*. The privilege additionally protects actual defendants by barring the prosecution from calling them as witnesses in their own criminal trials.³⁷⁹ The confession rule also protects potential and actual criminal defendants. To the extent that the confession rule influences and softens the tactics of interrogators in dealing with suspects, it protects *potential defendants*. This is a secondary effect. To the extent that it excludes confessions, it protects *actual defendants*. This is the primary effect of the rule. Although their primary and secondary effects are reversed, both the privilege and the confession rule protect potential and actual criminal defendants. Neither the privilege nor the confession rule

³⁷⁵ *Id.* § 2252, at 329 n.27.

³⁷⁶ *See infra* Part V.

³⁷⁷ *See infra* notes 608–39 and accompanying text.

³⁷⁸ 8 WIGMORE, *supra* note 3, § 2266, at 401.

³⁷⁹ *See id.* § 2268, at 406–08.

protects anyone else. Thus, although their operations are not identical, there is considerably more similarity than Wigmore's misleading argument suggests.

[T]hat the theory of confessions has no connection with the theory of this privilege is shown by the prevailing doctrine that testimony obtained by violation of the privilege cannot be objected to as such unless it is being used against the person thus disclosing. . . .³⁸⁰

On its face, this point is mystifyingly incomplete. The complete argument would have to add, "But an involuntary confession can be objected to by anyone against whom it is offered." The problem with the addendum is that it is false. Wigmore himself states, and approves of, the rule that a confession by a nonparty witness is not inadmissible on the ground of coercion.³⁸¹ Indeed, he makes the very point in his discussion of compulsory self-incrimination when he tries to persuade the reader that the two common law protections are different. As noted in connection with Wigmore's preceding argument, Wigmore says, "A party defendant is protected by the confession rule against the use of his own statements only. . . ."³⁸² Hence, Wigmore's present argument is footless.³⁸³ Instead of discovering a difference, he has inadvertently discovered a similarity and thereby subverted his own position.

Where the privilege is waived or not claimed, the confession rule may still operate to exclude. Where the privilege is nullified by statute (as it has been by the English Bankruptcy Act), the confession rule may still operate. Where the testimony, though given under oath, does not violate the confession rule, it may still involve a violation of the privilege.³⁸⁴

The first two illustrations of differences are true, but not relevant. The third is relevant, but not true. In the first, Wigmore compares a case in which the privilege has been waived with a case in which the confession rule has not been waived. In the second, he compares a case in which the common law privilege has been nullified by statute with a case in which the confession rule remains unimpaired. Thus, Wigmore has stacked the deck. Given his scenarios,

³⁸⁰ 3 WIGMORE, *supra* note 80, § 823, at 338 n.2 (textual cross-reference omitted).

³⁸¹ *See id.* § 815, at 289-90. The cases are not unanimous. Compare *People v. Portelli*, 205 N.E.2d 857 (1965) (credibility of witness' testimony against defendant properly submitted to jury even though witness had been beaten by police eight months earlier) with *Bradford v. Johnson*, 354 F. Supp. 1331 (E.D. Mich. 1972), *aff'd per curiam*, 476 F.2d 66 (6th Cir. 1973) (due process violated by the use against defendant of testimony of witness who had been tortured by police three months before testifying).

³⁸² 8 WIGMORE, *supra* note 3, § 2266, at 401.

³⁸³ *See* LEVY, *supra* note 13, at 495-97 & n.43. Professor Levy has carefully analyzed a variety of Wigmore's arguments and finds them wanting.

³⁸⁴ 8 WIGMORE, *supra* note 3, § 2266, at 401.

the protections will necessarily operate differently. The differences, however, are caused by factors that are wholly extrinsic to the protections. These factors say nothing about the protections themselves, and the illustrations are therefore irrelevant to our discussion.

In connection with the third illustration (on-oath examination), it is important to note that the oath to which Wigmore refers is not the oath *ex officio*, which obligated the witness to answer. That oath was abolished almost two hundred years before the cases on which Wigmore relies. Rather, Wigmore is referring to the ordinary oath which obligates the witness to tell the truth *if* he chooses to answer. During the early 1800s a few English courts did exclude on-oath testimony that had been taken in preliminary or collateral proceedings. However, in none of these cases was exclusion based explicitly on the privilege. Rather, it was based either on an interpretation of the Marian examination statutes or on some vaguely stated notion of involuntariness.³⁸⁵ Thus, one of the premises of Wigmore's third illustration (that on-oath examination is violative of the privilege) is simply incorrect. "Thus where a compulsory disclosure is offered, it may be admissible so far as the privilege against self-incrimination is concerned, and yet the question of its propriety as a confession may be raised [citing *R. v. Sloggett* . . .]"³⁸⁶

*Regina v. Sloggett*³⁸⁷ involved an English bankruptcy statute that abrogated *nemo tenetur* in certain bankruptcy examinations but did not purport to affect the involuntary confession rule. Wigmore's present point, therefore, is merely a more generalized statement of the second irrelevancy discussed immediately above. It too is irrelevant. "[W]here the privilege has been violated, there is no need of resorting to confessional principles to exclude it, since the theory of the privilege itself suffices to prevent the use of evidence obtained in consequence of such a violation."³⁸⁸

Although true, this point actually disserves Wigmore's argument. All it really says is that the privilege has the effect of excluding evidence that was obtained in violation of the privilege. It says nothing about the confession rule and does not compare the two protections in any way. If we supply the missing links, we find that both the privilege and the confession rule operate to exclude evidence. This is a similarity rather than a difference, and therefore undercuts Wigmore's position, even though, as noted above, the exclusionary function is

³⁸⁵ The cases are discussed in 3 WIGMORE, *supra* note 80, §§ 849-50 at 514-22. Illustrative of the cases cited by Wigmore are *Reg. v. Wheeley*, 8 Car. & P. 250, 173 Eng. Rep. 482 (Worces. Assizes 1838); *Rex v. Rivers*, 7 Car. & P. 177, 173 Eng. Rep. 78 (Oxford Cir. 1835); and *Rex v. Lewis*, 6 Car. & P. 161, 172 Eng. Rep. 1190 (Hereford Assizes 1833). In each case the excluded confession had been made on oath by a suspect in a preliminary proceeding. In none of the cases was exclusion based on the privilege.

³⁸⁶ 3 WIGMORE, *supra* note 80, § 823, at 337 n.2 (brackets in original).

³⁸⁷ 7 Cox Crim. Cas. 139 (Eng. Crim. App. 1856).

³⁸⁸ 3 WIGMORE, *supra* note 80, § 823, at 337 n.2.

secondary in the operation of the privilege and primary in the operation of the confession rule.

Wigmore's operational analysis is unpersuasive. To a much greater extent than he allows, the common law privilege and the confession rule operate in similar fashion. Although there are differences, they are slight and do not support his conclusion that the protections are distinct. Whether that conclusion is supported by other considerations remains to be seen.

2. Histories

Although Wigmore separately discusses the histories of the privilege and the confession rule in great detail, his comparison of the histories is rather slight.

That the *history* of the two principles is wide apart, differing by one hundred years in origin, and derived through separate lines of precedents, appears sufficiently from a survey of the two histories as already set forth. If the privilege, fully established in 1680, had sufficed for both classes of cases, there would have been no need in 1780 for creating the distinct rule about confessions.³⁸⁹

The history of the two rules . . . shows that there never was any historical connection or association between the constitutional clause and the confession-doctrine.³⁹⁰

The historical difference that Wigmore perceived is illusory. In concluding that "the *history* of the two principles is wide apart," Wigmore regarded *Warickshall* (1783) as the *origin* of the confession rule ("there would have been no need in 1780 for creating the distinct rule about confessions"). *Warickshall*, however, was not the origin of the rule. Rather, it was the *culmination* of all of the direct and collateral antecedents in the development of the rule. The direct antecedents were *Rudd's Case* (1775),³⁹¹ Gilbert's treatise (1754),³⁹² Lord Carteret's statement in the House of Lords (1742),³⁹³ the recorder's statement in the *Trial of Charles White* (1741),³⁹⁴ and Emlyn's revision of Hale's treatise (1736).³⁹⁵ The collateral antecedents were the defense lawyer's argument in *Mico* (1658),³⁹⁶ Hudson's treatise on the Star Chamber (*ante* 1635),³⁹⁷

³⁸⁹ 8 WIGMORE, *supra* note 3, § 2266, at 401.

³⁹⁰ 3 WIGMORE, *supra* note 80, § 823, at 338 n.2.

³⁹¹ 1 Leach 115, 168 Eng. Rep. 160 (K.B. 1775).

³⁹² *Supra* note 276.

³⁹³ *Supra* note 275.

³⁹⁴ 17 Howell's State Trials 1079 (1741).

³⁹⁵ *Supra* note 262.

³⁹⁶ Hardres 137, 139-40, 145 Eng. Rep. 419, 420-21 (Ex. 1658).

Staundiford's treatise (1607),³⁹⁸ various trials between 1551 and 1645,³⁹⁹ and the Edwardian treason statute (1547).⁴⁰⁰ Although all of the direct antecedents occurred after the emergence of the privilege, *Mico* and Hudson are of the era that produced the privilege, and all of the earlier antecedents of the confession rule coincided with various events in the development of the privilege. By focussing on *Warickshall* and ignoring its antecedents, Wigmore was able to paint a picture of two protections the histories of which were "wide apart." Had he not ignored the antecedents, however, he would have discovered overlapping histories.

Nor did Wigmore correctly conclude that there is no "historical connection" between the privilege and the confession rule. Wigmore ignored the fact that some of *Warickshall*'s antecedents (Gilbert's treatise, *Mico*, Hudson's treatise, and, perhaps, Carteret) claim that the requirement of voluntariness, whatever it may mean, derived from the *nemo tenetur* doctrine.⁴⁰¹ Of equal, if not greater, importance, Wigmore also ignored the fact that the historical backdrop against which both the privilege and the confession rule developed contained the common ground of torture.

Our earlier foray into the history of the privilege against compulsory self-incrimination leaves no doubt that torture was a part of the backdrop against which the privilege developed. During Mary's reign, people were burned merely for refusal to take the oath *ex officio*.⁴⁰² Efforts to assert a privilege began to gather momentum during the Elizabethan era.⁴⁰³ This was the very period in which torture was at its peak.⁴⁰⁴ Indeed, one of the important cases in the development of privilege—*Thomas Tresham's Case*—arose as a result of the torture of an accomplice.⁴⁰⁵ The threatened torture of Felton preceded the Lilburne saga by only nine years.⁴⁰⁶ Lilburne himself was whipped and

³⁹⁷ *Supra* note 243.

³⁹⁸ *Supra* note 182.

³⁹⁹ Trial of Lord Macguire, 6 Cobbett's State Trials 654 (1645); Trial of Sir Christopher Blunt, 1 Cobbett's State Trials 1409 (1600); Duke of Norfolk's Trial, 1 Cobbett's State Trials 957 (1571); Duke of Somerset's Trial, 1 Cobbett's State Trials 515 (1551).

⁴⁰⁰ An Act for the Repeal of Certain Statutes Concerning Treason and Felonies, 1547, 1 Edw. 6, ch. 12 (Eng.); 5 STAT. AT LARGE (Eng.) 259 (Danby Pickering ed., 1763).

⁴⁰¹ See *supra* notes 240–43, 275, 276 and accompanying text.

⁴⁰² See *supra* note 84 and accompanying text.

⁴⁰³ See *supra* notes 85–117 and accompanying text.

⁴⁰⁴ See LANGBEIN, TORTURE, *supra* note 33, at 134. The emergence of the privilege and the decline of torture also occurred during roughly the same period—the era of the Commonwealth. See *id.* at 135. Whether the former caused the latter is a matter of dispute. *Id.* It is possible that both derived from the same libertarian impulses. See LEVY, *supra* note 13, at 326–27.

⁴⁰⁵ The case is discussed *supra* at notes 43–44 and accompanying text.

⁴⁰⁶ See *supra* note 188 and accompanying text.

pilloried for refusing to take the oath.⁴⁰⁷ Finally, the very statute that abolished the oath and the prerogative court of High Commission also prohibited ecclesiastical courts from inflicting various penalties, including "pain" and "corporal punishment," for contempt.⁴⁰⁸

Torture was also a part of the backdrop against which the confession rule developed. The earliest antecedent of the confession rule was the Edwardian statute under which the two-witness requirement in treason cases could be displaced by a confession that was made "willingly and without violence."⁴⁰⁹ The reference to violence is surely a reference to torture.⁴¹⁰ Similarly, there was a concern about torture in the cases in which the claim of voluntariness was intended to bolster credibility. In the *Duke of Somerset's Trial*, the confession of a prosecution witness was said to have been made "without any kind of compulsion [or] force,"⁴¹¹ and in the *Trial of Sir Christopher Blunt*, the defendants' own confessions were said to have been voluntary, "no man being racked or tormented."⁴¹² A concern about torture also underlies Staundiford's statement that a guilty plea should not be accepted in any case if it was procured by "fear, menace, or duress;"⁴¹³ the statement in Emlyn's edition of Hale that a confession is inadmissible if made under "menace, or undue terror;"⁴¹⁴ and the statement in Gilbert that confessions are inadmissible if obtained by "pain and force."⁴¹⁵

That the history of both protections contains a concern about, and an aversion to, torture is well recognized. In 1730, Emlyn stated in his preface to the second edition of the State Trials, "In other countries, Racks and Instruments of Torture are applied to force from the Prisoner a Confession, sometimes of more than is true; but this is a practice which Englishmen are happily unacquainted with, enjoying the benefit of that just and reasonable Maxim, *Nemo tenetur accusare seipsum*"⁴¹⁶ A century and a half later, Judge Stephen repeated Emlyn's point:

⁴⁰⁷ See *supra* note 200 and accompanying text.

⁴⁰⁸ A Repeal of the Branch of a Statute *primo Elizabethae*, concerning Commissioners for Causes Ecclesiastical, 1640, 16 Charles 1, ch. 11, § 4 (Eng.), 7 STAT. AT LARGE (Eng.) 343, 344 (Danby Pickering ed., 1763).

⁴⁰⁹ An Act for the Repeal of Certain Statutes Concerning Treasons and Felonies, 1547, 1 Edw. 6, Ch. 12 (Eng.) 5 STAT. AT LARGE (Eng.) 259 (Danby Pickering ed., 1763) (emphasis added). The statute is discussed *supra* at notes 77–80 and accompanying text.

⁴¹⁰ See *Tong's Case*, Kelyng's Rep. 20, 23 (1664) (a "confession puts it out of the statute which requires two witnesses to prove the treason, unless the party shall without torture confess the same").

⁴¹¹ 1 Cobbett's State Trials 515, 517 (1551).

⁴¹² 1 Cobbett's State Trials 1409, 1419 (1600).

⁴¹³ Staundiford is discussed *supra* at note 182 and accompanying text.

⁴¹⁴ 2 HALE, *supra* note 262, at 284–85.

⁴¹⁵ GILBERT, *supra* note 276, at 140 (1769).

⁴¹⁶ 1 Cobbett's State Trials xxv (footnote omitted).

[T]he extreme unpopularity of the *ex officio* oath, and of the Star Chamber procedure founded upon it, had led to the assertion that the maxim, "*Nemo tenetur accusare seipsum*," was part of the law of God and of nature (to use the language of the day), an assertion which was all the more popular because it condemned the practice of torture for purposes of evidence, then in full use both on the Continent and in Scotland.⁴¹⁷

Going beyond Emlyn, however, Stephen also addressed the confession rule. "The general maxim, that confessions ought to be voluntary is historically the old rule that torture for the purpose of obtaining confessions is, and long has been, illegal in England."⁴¹⁸ Thus, Stephen perceived that the privilege and the confession rule were linked by their common condemnation of torture.

Although citing neither Emlyn nor Stephen, Charles McCormick, an American scholar, came to the same conclusion. He recognized that "[t]he disappearance of torture and the recognition of the privilege were victories in the same political struggle."⁴¹⁹ He also saw that a concern about torture underlay the Edwardian statute and that the statute was one of the antecedents of the confession rule.⁴²⁰ These perceptions led him to conclude that the two protections had a "kinship . . . too apparent for denial. It is significant that the shadow of the rack and thumbscrew was part of the background from which each emerged."⁴²¹

Wigmore himself discussed the phenomenon of torture in setting out the history of the privilege.⁴²² He did the same in his separate discussion of the history of the confession rule.⁴²³ Then he blithely proceeded to ignore the lessons of history. What is worse, he trivialized the history by saying, "That the two rules should be supposed to have something of a common principle or spirit is a not unnatural error."⁴²⁴ The error, however, was Wigmore's. The

⁴¹⁷ 1 STEPHEN, HISTORY, *supra* note 81, at 440. See also CHAFEE, *supra* note 334, at 188; ERWIN N. GRISWOLD, THE FIFTH AMENDMENT TODAY 2, 7, 75 (1955); LEVY, *supra* note 13, at 418; 1 MCCORMICK ON EVIDENCE § 118 (John William Strong ed., 4th ed. 1992) [hereinafter 1 MCCORMICK]; Charles T. McCormick, *Law and the Future: Evidence*, 51 NW. U.L. REV. 218, 221 (1956); Roy Moreland, *Historical Background and Implications of the Privilege Against Self-Incrimination*, 44 KY. L.J. 267, 274 (1956); R. Carter Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 783 (1935).

⁴¹⁸ 1 STEPHEN, HISTORY, *supra* note 81, at 447.

⁴¹⁹ Charles T. McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447, 453 n.24 (1938).

⁴²⁰ See McCormick, *supra* note 419.

⁴²¹ *Id.* at 453.

⁴²² 8 WIGMORE, *supra* note 3, § 2250, at 287 n.89.

⁴²³ 3 WIGMORE, *supra* note 80, § 818, at 294-95 n.7.

⁴²⁴ *Id.* § 823, at 538 n.2.

history of the two protections does not show that they have "no connection." It does not show that they are "widely separated." Nor does it show that they should be kept "plainly" and "distinctly apart." Rather, it shows that the privilege and the confession rule had overlapping developments and the "common principle or spirit" of condemning torture.

3. *Objectives*

Although Wigmore went into great detail in his separate discussions of the objectives of the privilege and the confession rule, his comparison of objectives is skimpy.

The sum and substance of the difference is that the confession-rule aims to exclude self-criminating statements which are *false*, while the privilege-rule gives the option of excluding those which are *true*. The two are complementary in that respect, and therefore cannot be coincident.⁴²⁵

On its face, this argument is problematic because it compares an asserted aim or objective of the confession rule with what is merely an "option" under the privilege. However, even on its own terms, the argument is misleading. Wigmore correctly asserts that the common law confession rule aimed to exclude putatively false statements. Excluding putatively true statements because of the way in which they were obtained was not one of its objectives. It is also correct that the privilege empowers a witness to refuse to give a true, but incriminating, answer, and empowers a court to exclude a party's true, but compelled, answer. However, Wigmore did not mention the fact that, by prohibiting torture, the privilege necessarily "gives the option" of excluding putatively false statements as well as true.⁴²⁶ To that extent, the two protections are coincident rather than complementary, and Wigmore's argument is misleading.

There is, however, an even greater flaw in Wigmore's comparison. To say that the "sum and substance of the difference" between the protections can be seen in the exclusion of evidence is to treat an *operation* as though it were an *objective*. The exclusion of evidence is simply an aspect of how the protections *operate*. The *objectives* of the protections are a wholly different matter. Not until we have identified and compared the objectives can we know whether the privilege and the confession rule are distinct.

The common law privilege establishes that self-incriminatory information "is not owed the state,"⁴²⁷ and that one may just say "no" if asked to divulge it. The privilege tells agents of government that they must take "no" for an

⁴²⁵ *Id.* § 823, at 338 n.2.

⁴²⁶ See discussion of torture *supra* at notes 130, 402-08 and accompanying text.

⁴²⁷ BERGER, *supra* note 85, at 31.

answer by barring them from using compulsion to obtain confessions. The privilege also excludes the fruits of compulsion. The history of the privilege demonstrates that compulsion includes force and the threat of force, jail and the threat of jail, and other browbeating or bullying tactics. Why would anyone want to create a privilege of silence? Why would anyone want to deny government these effective methods of inducing incrimination?⁴²⁸

The reasons for creating a privilege and denying government the authority to compel incrimination are illuminated by the diverse occasions in the development of the privilege when people resisted or attacked compulsory self-incrimination. Some of the claims of privilege⁴²⁹ are collateral or instrumental, part of a not-so-hidden agenda to achieve results that are not directly related to the objectives of the privilege; others are more direct. Some have stood the test of time; others have been supplanted and have simply faded from the scene.

We may immediately put aside the fact that the privilege was used in the struggle of the common law courts to contain the jurisdiction of ecclesiastical and prerogative courts. This collateral use tells us something about the courts, but nothing about the objectives of the privilege. We may also put aside the fact that the privilege was conscripted as a surrogate for freedom of conscience in the battle against state control of religious and political beliefs and speech. Although it was very important in its own time (and to a lesser extent in modern American history) this collateral use of the privilege says nothing about the *intrinsic* or *general* value of prohibiting compulsion and excluding its fruits. Moreover, it was eventually supplanted by more direct protections. Finally, we may disregard the "anti-fishing" argument, which recurred throughout the development of the privilege. Here, the claim of privilege was a claim of entitlement, in the interest of fair trial, to notice of the charges and to confrontation of accusers. This too was a collateral use of the privilege which says nothing about the value of prohibiting compulsion and which has been supplanted by other protections.⁴³⁰

Although the history of the privilege is replete with collateral uses, none of them limited the eventual scope of the privilege. Instead, a broad privilege

⁴²⁸ In asking these questions, I am seeking only to identify the objectives commonly attributed to the privilege or those that may be fairly inferred. My purpose is to compare the objectives with the objectives of the confession rule. I am not seeking justifications for the privilege. Thus, I am not concerned that some objective may not suffice to explain all of the uses to which the privilege has been put or all of the prohibitions that it embodies.

⁴²⁹ I am using "claims of privilege" in the present context to mean the claim that compulsory self-incrimination is wrong. Whether the claim succeeded or failed in a particular instance is not important. What is important is discovering why the claim was made.

⁴³⁰ The "anti-fishing" argument is more complicated than I have portrayed it in the text above. It does have a facet that addresses the value of not compelling a person to make incriminating statements. See discussion *infra* at notes 435-437 and accompanying text.

emerged as part of a larger package of libertarian reforms.⁴³¹ As Professor John McNaughton put it:

That not only the fishing expedition incident to the hated oath *ex officio* but *all* authority to compel self-incriminatory disclosures was extinguished in the final decades of the seventeenth century may be attributable to the revolution in political thought which was occurring at the time. The sovereign king was being supplanted by the sovereign individual.⁴³²

If the privilege finally gained full recognition in the name of individual sovereignty, it is in that concept that we must seek the objectives of the privilege, *i.e.*, the reasons for permitting silence and prohibiting compulsion.

In current discussions of individual liberties, three values prominently appear: autonomy, privacy, and dignity.⁴³³ The overarching purpose of the privilege is to preserve these values and the interests that underlie them. As sovereign individuals, we have an interest in the integrity of our bodies—in avoiding death, physical injury, and pain; in deciding whether we will let anyone touch our bodies, and, if so, who, when, and under what circumstances. The importance of this interest is demonstrated by the fact that it is one of the major concerns of, and protected by, both the law of torts and the law of crimes. Bodily integrity is a part of the larger values of autonomy and dignity. By condemning and prohibiting torture and excluding its evidentiary fruits, the privilege protects the interest in bodily integrity and the values of autonomy and dignity.⁴³⁴

Just as we have an interest in not having others invade our bodies, so we, as sovereign individuals, also have an interest in not having others invade our minds. This interest was asserted early in the history of the privilege and has remained an important part of it. When various recalcitrants made the “anti-fishing” argument, they were claiming more than merely a fair-trial interest in notice and confrontation. They were saying, “I am a human being and I have rights which you must respect. It is wrong for you to disturb me by trying to compel me to incriminate myself unless you have the substantial justification that comes when a known accuser, whom you are willing to identify, makes a

⁴³¹ See *supra* note 51 and accompanying text.

⁴³² 8 WIGMORE, *supra* note 3, § 2252, at 317–18. This section was totally revised by Professor McNaughton; the words are therefore his, not Wigmore’s. For a similar view of the privilege as a manifestation of individual sovereignty, see Abe Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 CLEV. B. ASS’N J. 91, 98–99 (1954).

⁴³³ See, e.g., 1 WAYNE R. LAFAVE & JERALD H. ISRAEL, *CRIMINAL PROCEDURE* 49–51 (1984); Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1419, 1420, 1425, 1430 (1974).

⁴³⁴ That the privilege protects a dignity value is well recognized and not controversial. See GRISWOLD, *supra* note 417, at 7; Benner, *supra* note 246, at 64; Jack B. Weinstein, *The Law’s Attempt to Obtain Useful Testimony*, 13 J. SOC. ISSUES 6, 9 (1957).

specific accusation, which you are willing to disclose.”⁴³⁵ Although this argument does not clearly articulate the interests that underlie the prohibition of compulsion, there may be three: repose, peace of mind, and controlling what others learn about one’s self. These interests are, of course, constituents of the values of autonomy and privacy.⁴³⁶

It is true that this aspect of the “anti-fishing” argument asserts no absolute bar to compulsory self-incrimination and no absolute entitlement to repose, peace of mind, and control of information. To the contrary, it implicitly concedes that repose and peace of mind may be disturbed and that answers to self-incriminating questions may be demanded after the interrogee receives notice of the charges and an opportunity to confront accusers. However, in the actual development of the common law privilege, when government came to respond to the “anti-fishing” argument by providing notice and identifying the accusers, witnesses still declined to answer,⁴³⁷ and their refusals were eventually sustained. Thus, as the privilege has evolved, these interests and the values of autonomy and privacy play a much more prominent part than the “anti-fishing” argument suggests.

Repose, peace of mind, and one’s ability to control information are treasured by all forms of compulsion to incriminate. Torture and the threat of torture engender fear. Browbeating, jail, and the threat of jail create stress. The stress is exacerbated by the fact that the very purpose of compulsion is self-

⁴³⁵ Trial of John Lilburne, 3 Cobbett’s State Trials 1315 (1637). See *supra* notes 193–202 and accompanying text for discussion of the various statements made by John Lilburne in connection with his 1637 trial for shipping seditious books into England.

⁴³⁶ That the values of the “anti-fishing” argument are autonomy and privacy is recognized in 8 WIGMORE, *supra* note 3, § 2251, at 314. For a discussion of privacy as a value of the modern privilege, see BERGER, *supra* note 85, at 41–44; Robert S. Gerstein, *Privacy and Self-Incrimination*, 80 ETHICS 87 (1970). Professor Fried has observed:

An excellent, very different sort of example of a contingent, symbolic recognition of an area of privacy as an expression of respect for personal integrity is the privilege against self-incrimination . . . By according the privilege as fully as it does, our society affirms the extreme value of the individual’s control over information about himself. To be sure, prying into a man’s personal affairs by asking questions of others or by observing him is not prevented by the privilege. Rather it is the point of the privilege that a man cannot be forced to make public information about himself. Thereby his sense of control of what others know of him is significantly enhanced . . .

Charles Fried, *Privacy*, 77 YALE L.J. 475, 488 (1968). A concern about privacy and its underlying interests may have been at the root of the outraged complaints that were made when Bishop Grosseteste attempted to inquire into the sexual conduct of those who lived in the diocese of Lincoln. See *supra* note 39 and accompanying text.

⁴³⁷ See *supra* notes 112–115 and accompanying text (discussion relating to Thomas Cartwright).

incriminatory disclosure. The person's natural instinct is to protect himself. But, instead of being permitted to act in accordance with instinct, he is pressured to engage in the unnatural act of disclosing intimate information which may humiliate or even destroy him.⁴³⁸ By prohibiting compulsion to incriminate and excluding its evidentiary fruits, the privilege protects our interests in repose and peace of mind and enables us to control information about ourselves. Thus, it serves the larger values of autonomy and privacy.

There is yet another way in which the privilege and its prohibition of compulsion serve individual sovereignty and its underlying values. Earlier in this article, I said that deterring or excluding unreliable confessions was one of the *effects* or *operations* of the privilege. Now, I want to make the point that deterring or excluding unreliable confessions is one of the *objectives* of the privilege.

The privilege condemns and prohibits torture and the threat of torture. One of the evils of torture is that it violates the interest in bodily integrity. Another is that it results in putatively unreliable confessions. In 1628, Felton, the admitted murderer of the Duke of Buckingham, was threatened with torture by the Bishop of London after he denied having accomplices. Felton replied that if he had to reveal imaginary accomplices, then, "in the extremity of torture, and if what he should say then must go for the truth" he might accuse the Bishop and other members of the privy counsel. The questioning ceased.⁴³⁹ Almost a century later, the Council of Rome abolished the oath *de veritate dicenda*. One of its reasons was that the oath procedure produced unreliable confessions.⁴⁴⁰ In 1730, Emlyn, while touting the English privilege, unfavorably compared countries without the privilege in which "[r]acks and Instruments of Torture are applied to force from the Prisoner a Confession, sometimes of more than is true."⁴⁴¹ If any point in the history of the privilege is uncontroversial, it is that torture or the threat of torture may produce false confessions.⁴⁴²

Other forms of compulsion are also suspect. If threatened with contempt or otherwise browbeaten for refusal to answer questions, an innocent interrogee may well decide to avoid the imminent prospect of jail or the stress of the

⁴³⁸ Throughout the history of the privilege there were complaints that compulsory self-incrimination was unnatural and cruel, *see supra* note 96 and accompanying text (discussion relating to Giles Wiggenton), or contrary to the law of nature. *See supra* note 93 and accompanying text (discussions relating to Thomas Tresham) and note 201 (discussion relating to John Lilburne).

⁴³⁹ 3 Cobbett's State Trials 367, 371 (1628). The case is discussed *supra* notes 188-90 and accompanying text.

⁴⁴⁰ LEVY, *supra* note 13, at 24.

⁴⁴¹ Emlyn's entire statement is set out *supra* note 416 and accompanying text.

⁴⁴² *See State v. Hobbs*, 2 Tyl. 380 (Vt. 1803) (dictum that state constitutional provision prohibiting compulsory self-incrimination prohibits torture and therefore seeks to bar confessions of doubtful reliability).

moment by giving his interrogator what he believes the interrogator wants—a confession—and take his chances with the more remote prospect of conviction and punishment. The likelihood of a false confession here is certainly less than in a case of torture, but the risk should not be ignored. As one commentator has observed:

The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer,—that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized.

. . . [I]t is difficult to know how much allowance is to be made [for the fact that, in the Anglo-American system, unlike the Continental system, the judicial and prosecuting functions are sharply separated]; and it is wiser to accept the warnings of experience, even at the risk of overstraining their import. It may be conceded that the Continental practice is efficacious in detecting guilt. But it must also be conceded that it leads to or is found united with a spirit of petty judicial license and browbeating, dangerous to innocence, and certain to lead to great abuses in our own community, if it once obtained a sanction.

This statement, you may be surprised to learn, was written by Dean Wigmore.⁴⁴³ As well as anything in the literature, it captures the essence and importance of the point that various forms of compulsion may produce unreliable confessions.⁴⁴⁴ It also tells us why we should be concerned. Any lawyer who has tried even a few criminal cases knows that a confession will powerfully influence the outcome of a case.⁴⁴⁵ If the prosecution uses an unreliable confession, there is a substantial risk that an innocent person will be

⁴⁴³ 8 WIGMORE, EVIDENCE § 2251, at 309 (3d ed. 1940) (footnote omitted). *See also* 1 MCCORMICK, *supra* note 417, § 118, at 430–31. I hasten to add that, although Wigmore rejected the notion that the privilege should be abolished, he favored a narrow interpretation of the privilege lest there be “justice tampered with mercy.” 8 WIGMORE, *supra* at 318 (quotation attributed to “a wit”).

⁴⁴⁴ The same point was made almost two centuries earlier in Gilbert’s treatise on evidence. GILBERT, *supra* note 276, at 121–47; *see supra* notes 276–83 and accompanying text.

⁴⁴⁵ I both prosecuted and defended felony cases as a young lawyer in the Army Judge Advocate General’s Corps. The defendant had confessed in many of the contested cases. In only one of those cases did the military jury acquit the defendant. The outcome-determinative role of confessions has been recognized by the Supreme Court. *See Jackson v. Denno*, 378 U.S. 368, 382 (1964).

convicted and punished.⁴⁴⁶ The conviction is likely to be stigmatizing. The punishment may be liberty-depriving or, what is worse, fatal. Surely, there can be no greater offense to bodily integrity, repose, and peace of mind than the conviction and punishment (perhaps the execution) of the innocent; surely, there can be no greater impingement upon autonomy, privacy, and dignity; just as surely, convicting and punishing the innocent are the ultimate affronts to individual sovereignty.

Compulsion to incriminate intrinsically offends the calculus of individual sovereignty. Consequently, the privilege prohibits it even though it may serve societal interests by producing a true confession. When compulsion produces a false confession, however, when it results in the conviction and punishment of the innocent, there is a second level at which individual sovereignty is offended. At this level, the offense is exacerbated by the additional effects of conviction and punishment. What is worse, there is no legitimate societal interest in obtaining an unreliable confession. If it is an objective of the privilege to protect individual sovereignty against the intrinsic effects of compulsion, it should also be an objective of the privilege to deter and exclude putatively unreliable confessions obtained by compulsion.⁴⁴⁷

Having identified the objectives of the privilege, we must now identify the objectives of the involuntary confession rule. Most of the antecedents of *Warickshall* imply that the *sole* purpose of the confession rule is to exclude putatively unreliable confessions.⁴⁴⁸ This implication comes to full bloom in *Warickshall*. As a result of the victim's promise not to prosecute, Warickshall confessed to receiving stolen property and led the authorities to it.

⁴⁴⁶ A person may be "innocent" in the sense that he committed no crime at all or in the sense that he committed a less serious crime than the one to which he confessed. See Lawrence Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 454 n.25 (1964).

⁴⁴⁷ In justifying and defending the privilege, some scholars have gone to great lengths to imagine situations in which the privilege is properly *invoked* by an innocent person. See, e.g., GRISWOLD, *supra* note 417, at 9-19. These examples miss the point. It is not very likely that an innocent person would invoke the privilege in a public inquiry, although it is possible. The real bite of the privilege in protecting the innocent is in its very *creation*. Without the privilege or some other guarantee against compulsion, governments might obtain false confessions by resorting to oppressive tactics. To this extent, the privilege is prophylactic. Partly to guard against unreliable confessions, we *create* a privilege which even the guilty may *invoke*. We do so, however, to insure that the innocent will be protected.

As will appear from a later discussion, however, see *infra* notes 462-63 and accompanying text, the concern for innocence does not lie at the core of the privilege. Rather, it is contingent on the existence of compulsion or its equivalent. If neither compulsion nor its equivalent is present, the privilege should not operate to exclude a putatively unreliable confession.

⁴⁴⁸ See *supra* notes 257-69, 275-76 and accompanying text.

Notwithstanding the promise, there was a prosecution. After the court excluded Warickshall's confession, the prosecutor offered the derivative evidence—the property and the fact that it had been found in Warickshall's bed. Since the evidence was perfectly reliable, it could not be excluded on the ground of putative unreliability. Instead, the defense lawyer argued that the evidence had to be excluded in order to make good on the promise not to prosecute. If the evidence were admitted, “the faith which the prosecutor had pledged would be violated, and the prisoner made the deluded instrument of her own conviction.”⁴⁴⁹ The court flatly rejected the argument: “It is a mistaken notion, that the evidence of *confessions and facts* which have been obtained from prisoners by *promises or threats*, is to be rejected from a regard to public faith. . . .”⁴⁵⁰ Instead of a “public faith” test, the court used a reliability-based approach:

Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not intitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt . . . but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected. This principle respecting confessions has no application whatever as to the admission or rejection of *facts*, whether the knowledge of them be obtained in consequence of an extorted confession, or whether it arises from any other source. . . .⁴⁵¹

Although the court clearly stated that the *sole* purpose of the confession rule is to exclude putatively unreliable evidence, it did not go beneath the surface of its holding to ask why an unreliable confession should be excluded. Had it asked that question, it would have discovered the obvious: that unreliable confessions intolerably increase the risk of convicting and punishing the innocent. Had it then asked why there should be a concern about convicting the innocent, it would have discovered what is only slightly less obvious: that convicting and punishing the innocent offends the interests in bodily integrity, repose, and peace of mind, and the values of autonomy, privacy, and dignity, all of which underlie the concept of individual sovereignty.

Thus, the real objective of excluding involuntary confessions is to preserve important human values by protecting the innocent from being convicted and punished. This is also *an* objective of the privilege. Surely Wigmore grossly

⁴⁴⁹ 1 Leach 263, 168 Eng. Rep. 234 (K.B. 1783).

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.* at 263–64, 168 Eng. Rep. at 234–35.

overstated his case in asserting that the two protections are “complementary” and not “coincident.”⁴⁵²

When we closely compare the privilege and the confession rule, we find a picture that is quite different from Wigmore's. The most prominent difference is operational. The privilege operates *primarily* at the *examination* stage, empowering the interrogee to say “no,” and requiring the examiner to respect the answer by refraining from compulsion. The confession rule, by contrast, operates *primarily* at the *trial* to exclude involuntary confessions. As noted earlier, however, both protections have *secondary* operations. The privilege operates at *trial* to exclude the fruits of compulsion, and the confession rule operates at the *examination* to soften the tactics of the examiner.⁴⁵³ Thus, each protection operates both at examination and at trial and each has an exclusionary effect. In other respects, the two protections are also remarkably similar. Their histories overlap and were written against the common backdrop of torture. Moreover, the primary objective of the confession rule—avoiding the baleful effects of unreliability—is one of the objectives of the privilege.

Given their similarities, one is hard-pressed to find any value in the confession rule that is independent of the privilege. *Indeed, the confession rule appears to be nothing more than the exclusionary rule of the privilege, and we would do well to give up the confession rule and think of exclusion solely in terms of the privilege.*

Yet, even as I write these words, I am troubled. If what I have just said is correct—if the confession rule is merely the exclusionary part of the privilege—why, in determining the admissibility of confessions, have generations of judges ignored the privilege and used only the language of the confessions rule, as did the court in *Warickshall*, and why have generations of treatise writers discussed the two protections in *separate* chapters? Is there some difference between the two that we have not yet discovered? And if a difference exists, is it broad or narrow, important or slight? Wigmore gives us a clue. “The confessions rule is broader because it may exclude statements which are obtained by promises as well as compulsion.”⁴⁵⁴

Although couched as an operational point, this argument actually relates to the objectives of the two protections. It asserts, in essence, that a promise never constitutes compulsion, that the confession rule protects against promises as well as compulsion, but that the privilege protects only against compulsion and not against promises. Wigmore did not define his terms, but we must do so in order to gauge the validity of his argument. A “promise” is “a declaration that something will or will not be done” or “an express assurance on which

⁴⁵² 3 WIGMORE, *supra* note 80, § 823, at 338 n.2.

⁴⁵³ See *supra* notes 378–79 and accompanying text.

⁴⁵⁴ 8 WIGMORE, *supra* note 3, § 2266, at 401.

expectation is to be based."⁴⁵⁵ "Compel" means "to force or drive, especially to a course of action."⁴⁵⁶ To these definitions, we must add the definition of "threat": "a declaration of an intention or determination to inflict punishment, injury, death, or loss on someone in retaliation for, or conditionally upon, some action or course."⁴⁵⁷ From these definitions, it is clear that every conditional threat is either actual or attempted compulsion; that some, but not all, promises are threats; and that some, but not all, promises are therefore either actual or attempted compulsion.

Let us now consider a case in order to test Wigmore's point. At a preliminary examination, the magistrate says to the suspect, "Did you commit the crime? If you do not answer my question, I promise you that I will have you thrown in jail and beaten." The suspect then confesses. Has the magistrate violated the privilege? Is the confession admissible at a subsequent criminal trial? On these facts, the answers are beyond doubt. The magistrate's promise was also a threat. As such, it compelled the suspect to speak. Consequently, the magistrate's "promise" violated the privilege, and the resulting statement is inadmissible by virtue of the privilege. This illustration shows that the privilege does protect against some promises and that Wigmore was wrong when he implied the contrary.⁴⁵⁸

If Wigmore were alive, however, he would undoubtedly reply, "Unfair. You are playing with my words. Of course, some promises are threats and are therefore within the coverage of the privilege. I never meant to say otherwise. All I meant was that the privilege does not protect against promises that are not threats, that is, against 'benign' promises." To test this position, let us consider a case involving a "benign" promise. At a preliminary examination, the magistrate says to the suspect, "Did you commit the crime? If you do not answer my question, nothing bad will happen to you. No one will beat you or

⁴⁵⁵ RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1151 (1983).

⁴⁵⁶ *Id.* at 300.

⁴⁵⁷ *Id.* at 1478.

⁴⁵⁸ The facts of the hypothetical case are similar to the facts of John Lilburne's first trial, except that Lilburne did not confess and there was thus no occasion to decide whether a confession was admissible. The facts are also similar to *Queen v. Garbett*, 2 Cox Crim. Cas. 448 (Ex. 1847), except that the witness, who made self-incriminating statements under threat of jail, was not threatened with a beating. In *Garbett*, the incriminating statements were held inadmissible, apparently on the theory that they had been obtained in violation of the privilege.

In some of its involuntary confession cases, the Supreme Court has clearly recognized that some promises are threats. *See, e.g., Haynes v. Washington*, 373 U.S. 503, 509, 514 (1963) (promise that defendant would be allowed to call his wife after he "made a statement and cooperated," characterized as an "express threat of continued incommunicado detention"); *Lynum v. Illinois*, 372 U.S. 528, 532, 533, 534 (1963) (statements that defendant would lose custody of her young children, but police "would go light on her" if she cooperated, characterized as "threats").

threaten you with force; no one will put or threaten to put you in jail for not answering; and no one will bully or browbeat you. If you decline to answer, as is your right, your choice will be respected. However, if you admit your guilt, I will dismiss all the charges against you." Thus assured, the suspect confesses that he committed the crime. The charges, however, are not dismissed. Perhaps the magistrate never intended to dismiss them; perhaps his promise was disavowed by a higher authority. Whatever the case, the suspect is tried. Has the privilege been violated? Should the privilege make the suspect's confession inadmissible?

These questions are quite hard, and there are good arguments on both sides. The argument in favor of admissibility is that the magistrate fully respected both the privilege of silence and the protection against compulsion. He explicitly respected the privilege of silence by promising to honor the suspect's choice. He implicitly respected it by bargaining with the suspect. His offer implicitly recognized that the government had no right to obtain the information and that the suspect was entitled to withhold it. Indeed, the very purpose of the promise was to induce the suspect to relinquish his privilege. The magistrate also respected the protection against compulsion. There was no force or threat of force, no jail or threat of jail, and no other bullying or browbeating. By not using any traditional form of compulsion to obtain evidence, the magistrate fully preserved the suspect's autonomy, privacy, and dignity. The suspect might have been tempted, but he was not forced or driven to accept the offer. He could have declined to confess and taken his chances with the ordinary processes of law. Since the magistrate respected the privilege of silence and did not use compulsion, the privilege was not violated and the confession should be admissible as far as the privilege is concerned. That the suspect did not receive the benefit he was promised has nothing to do with either a privilege of silence or a protection against compulsion.

The argument against admissibility is that the government dishonored the privilege of silence and trenched the values protected by it. It was the suspect's privilege to control the flow of information about himself. He could choose to speak or to withhold information. Although the magistrate initially respected the privilege both explicitly and implicitly, it was dishonored when the government broke its promise. The broken promise is of crucial concern to the privilege. Had the suspect known that he would not receive the benefit of his bargain, he would have chosen to withhold information. The government's deception thus directly persuaded him to give up his autonomy and privacy. Moreover, the very fact that the government resorted to deception shows contempt not only for the suspect's privilege of silence, but also for his reliance on justifiable expectations in connection with the privilege. This flouts the suspect's dignity. In no other situation would the government be allowed to create and defeat expectations with impunity. In civil cases, the law of torts would redress misrepresentation, and the law of contracts would either give compensation for

breach of an agreement or perhaps grant specific performance. In criminal cases, the government would be held to its plea agreement or the defendant would be allowed to withdraw his plea. The result should be the same here. Moreover, guarding against unreliable confessions is a purpose of the privilege. Any confession obtained by a promise of no prosecution is putatively unreliable. That the magistrate did not use any common form of compulsion should not be controlling. The privilege comprises two parts: a privilege of silence and a stricture against compulsion. If either is infringed, the privilege has been violated.

Although the arguments on both sides are plausible and the issue is very close, I am marginally persuaded by the defendant's argument and I would, by virtue of the privilege, exclude the confession. To permit the government to induce a confession by a misrepresentation "sound[s] a word of promise [about the privilege] to the ear, sure to be disappointing to the hope."⁴⁵⁹ Moreover, the situation of our hypothetical suspect is close to the situation of a suspect who has been promised immunity. Under the modern privilege, the immunized suspect is entitled to insist on the exclusion of his confession and any evidence derived from his confession. Anything less is a breach of the immunity agreement and the privilege itself.⁴⁶⁰ Just as the government is obligated by the privilege to the terms of its immunity agreement, so should it be obligated by the privilege to refrain from using a confession that it has induced by a no-prosecution promise.⁴⁶¹

If we accept the defendant's argument, we have discovered a situation in which, contrary to Wigmore, the privilege protects against even a "benign" promise.⁴⁶² However, I frankly admit that the case is too close for comfort and

⁴⁵⁹ *Baker v. Carr*, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting).

⁴⁶⁰ *See New Jersey v. Portash*, 440 U.S. 450, 459 (1979) (state's use of immunized testimony to impeach defendant held violative of constitutional privilege). Although the situation of the hypothetical suspect in the text above is close to that of the immunized suspect, it is not identical. In the immunity situation, the immunized witness always knows that he will be punished for contempt if he refuses to answer. Thus, there is "compulsion" in the traditional sense. In the hypothetical situation, however, the suspect knows that he will not be punished. That difference is precisely what makes the hypothetical situation so close.

⁴⁶¹ I am not concerned with the appropriate remedy for breach of the privilege. Thus, I am not concerned with whether the suspect may be entitled to insist that the charges be dismissed.

⁴⁶² The position I take in the text asserts that conduct falling short of compulsion may violate the common law privilege. Although compulsion was always a factual component of the situations that gave rise to the common law privilege, *see* LEVY, *supra* note 13 *passim*, it seems to me that the values protected by the privilege are broader. If government induces a confession by action that flouts the values of the privilege, the privilege should be applicable. I confess, however (no pun intended), that generations of commentators have *assumed* that compulsion was part and parcel of the privilege. *See* 4 WILLIAM

my resolution of it may be wrong. Consequently, it may be wise to pursue the inquiry a bit further. The essence of the situation just discussed is that a "benign" promise was *broken*. Suppose, however, that it had been *kept*. Let us consider another case. A suspect and his minor son have been charged with the same crime. At their preliminary examination, the magistrate says to the suspect, "Did you commit the crime? If you do not answer my question, nothing bad will happen to you or your son as a result of your refusal to answer. No one will beat you or threaten you with force; no one will put or threaten to put you in jail for not answering; and no one will bully or browbeat you. If you decline to answer, as is your right, your choice will be respected. However, if you admit your guilt, I will dismiss all the charges against your son." Thus assured, the suspect confesses that he committed the crime. In exchange for his confession, the magistrate does dismiss the charges against the son. Has the privilege been violated? At a subsequent trial, should the privilege make the suspect's confession inadmissible?

The argument in favor of admissibility is essentially the same as the one above: the magistrate respected not only the privilege of silence but also the protection against compulsion. Indeed, the argument is stronger, for the defendant received precisely what he expected. Thus, there is no need to consider the effect of a broken promise. The argument against admissibility, however, is considerably weaker. The government neither deceived the suspect nor broke a promise. Thus, it did not impinge upon the autonomy and privacy that underlie the suspect's privilege to choose whether to divulge information

BLACKSTONE, COMMENTARIES 296 (1900); BURNS, *supra* note 305, at 454; CHITTY, *supra* note 128, at 620; LEVY, *supra* note 13, at 328; MACNALLY, *supra* note 305, at 258; PHILLIPS, *supra* note 305, at 276, 283; 1 THOMAS STARKIE, EVIDENCE 105 (London, J. & W.T. Clarke 1824); STEPHEN, DIGEST, *supra* note 305, at 117; TAYLOR, *supra* note 305, at 969-77. None of these sources, however, defines compulsion or discusses whether a broken promise is within the protection of the privilege. It is quite possible that the authors assumed that a recurring fact was a part of the rule.

The commentators are not unanimous. Professor Benner has observed that:

a proper understanding of the historical forces that gave rise to the privilege against self-incrimination reveals that the essence of freedom from self-incrimination lies in its conception of the relationship between the state and the individual as one characterized by fairness. The absence of coercion is therefore a necessary, but never a sufficient, basis for that relationship.

Benner, *supra* note 246, at 130. It should be kept in mind that I am now discussing only the *common law* privilege. The *constitutional* privilege prohibits only compulsion, and "a necessary element of compulsory self-incrimination [under the constitutional privilege] is some kind of compulsion." *Hoffa v. United States*, 385 U.S. 293, 304 (1966) (no compulsion when false friend, acting as government agent, tricked suspect into making incriminating admission).

about himself. Nor did it flout the suspect's dignity by defeating his justifiable expectations. Rather, the government acted as it would be required to act in comparable situations. It kept its word. The only argument left to the suspect, therefore, is that the promise induced a putatively unreliable confession and *for that reason alone* jeopardized the values of autonomy, privacy, and dignity. The question emanating from this argument is whether, in the absence of both compulsion and any flouting of the privilege to remain silent, the privilege has any concern for reliability and its underlying values. The argument that the privilege does have such a "free-standing" concern for reliability takes the privilege far from its historical context and dramatically reshapes it. If government recognizes that it has no right to information and that the suspect has a right to withhold it, and if government eschews both compulsion and broken promises, it should not be said that the privilege has been violated. Thus, although an objective of the privilege is to deter and exclude unreliable confessions, the objective is contingent or secondary; that is, it is always dependent upon either compulsion or some other flouting of the privilege to remain silent.

However, to say that the privilege has not been violated is quite different from saying that the suspect's confession should be admissible. Promising to dismiss the charges against the child is a powerful inducement, and even an innocent parent might confess. The parent's confession is therefore putatively unreliable.⁴⁶³ If a reliability-based exclusionary rule did not exist apart from the privilege, one might want to create it.

One might also want to create a non-privilege exclusionary rule in another situation. Suppose a suspect is arrested by a group of private citizens who have no connection with government. The vigilantes threaten to kill the suspect unless he confesses, and confess he does. Have the vigilantes violated the suspect's privilege? Should the privilege bar the prosecution from using the confession as evidence at a subsequent trial? The privilege developed out of a struggle for individual rights at a time when church and state were one. The protagonists were individuals, on the one hand, and religious and secular *government*, on the other.

To apply the privilege to protect against wholly private action would, as with kept promises, take the privilege far from its historical context and dramatically reshape it. As long as government has not encouraged or tolerated the private action, We should not say that the privilege has been violated even by governmental use of the evidence. Once again, however, the confession is

⁴⁶³ See *Commissioners of Customs & Excise v. Harz*, 1967 App. Cas. 760, 821 (appeal taken from Eng.) (dictum). For a useful discussion of reliability, see Yale Kamisar, *What is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728, 753-55 (1963).

putatively unreliable. If a reliability-based exclusionary rule did not exist apart from the privilege, one might want to create it.

4. Conclusion

Wigmore had a point, after all. But the point is much narrower than he made it seem. In only two situations is there clearly any need for a reliability-based exclusionary rule apart from the privilege: confessions induced by "benign," kept promises and confessions induced by private action. In these situations the privilege is inapplicable and the interest in reliability can be vindicated only by a separate rule.⁴⁶⁴ However, if a confession has been obtained by conduct that violates the privilege, it is inadmissible *by virtue of* the privilege. Even Wigmore concedes this point, although grudgingly.⁴⁶⁵ The privilege fully vindicates all relevant interests, including the interest in reliability. Nothing remains to be served by any independent rule. As I stated earlier, to the extent that the confession rule mandates inadmissibility in *this* situation, it is the exclusionary rule of the privilege and should not be given any independent significance.⁴⁶⁶

Having closely compared the operations, histories, and objectives of the privilege and the confession rule, having discovered that the confession rule is for most purposes a part of the privilege, and having delineated only a narrow area for the independent operation of the confession rule, we may now use the fruits of our inquiry to evaluate and perhaps explain the English and American materials sketched earlier which deal with the development of the confession rule. In turn, we may ask whether, and to what extent, these materials support the thesis that, for the most part, the confession rule serves no purpose independent of the privilege.

⁴⁶⁴ If, in the case of the benign, broken promise, discussed *supra* notes 458-62 and accompanying text, we hold that the privilege was not violated, we would still want to vindicate the interest in reliability by excluding the confession.

⁴⁶⁵ See 3 WIGMORE, *supra* note 80, § 823, at 337 n.1; 8 WIGMORE, *supra* note 3, § 2270, at 416-17.

⁴⁶⁶ I reject the position taken some years ago by Judge Henry Friendly that the involuntariness rule was created by courts as a remedy for abuses of suspects by magistrates at the examination stage of the process. Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 709 (1968). Judge Friendly cites nothing of direct relevance to support his assertion nor does he explain why the privilege would have been inapplicable in such a case. Neither *Rudd* nor *Warickshall* involved the admissibility of a confession obtained by abusive examination practices.

C. Evaluating and Explaining English and American Materials

1. English Materials

The remote antecedents of the confession rule are the Edwardian treason statute (1547),⁴⁶⁷ a group of cases involving the credibility of confessions (1551-1645),⁴⁶⁸ Staundiford's treatise (1607),⁴⁶⁹ Hudson's treatise on the Star Chamber (*ante* 1635),⁴⁷⁰ and defense counsel's argument in *Mico* (1658).⁴⁷¹ None of these sources deals with the admissibility of extrajudicial confessions, so none is directly in point. The first three sources antedate the acceptance of the *nemo tenetur* doctrine into English law, so it is not surprising or significant that they do not refer to it.

However, the privilege had started to gain a foothold when Hudson wrote, and had already been recognized by the time of *Mico*. Thus, under the thesis I have just advanced, if either Hudson or *Mico*'s lawyer was concerned with compelled confessions, we might expect to find a reference to *nemo*. Hudson's concern was that a confession be "voluntary."⁴⁷² *Mico*'s lawyer insisted that a guilty plea not "proceed from dread" or "be extorted by any compulsion."⁴⁷³ These concerns do relate to compelled confessions, and both Hudson and *Mico* do refer to *nemo*. Indeed, each cites *nemo* as the *source* of the stricture against compelling confessions, thus supporting the thesis of this Article. However, since neither Hudson nor *Mico* was discussing the *admissibility* of extrajudicial confessions, the support is indirect.

The strands in the direct development of the confession rule are Emlyn's edition of Hale (1736),⁴⁷⁴ the *Trial of Charles White* (1741),⁴⁷⁵ Lord Carteret's statement in the House of Lords (1742),⁴⁷⁶ Gilbert's treatise (1764),⁴⁷⁷ and the cases of *Rudd* (1775)⁴⁷⁸ and *Warickshall* (1783).⁴⁷⁹ Since the privilege was

⁴⁶⁷ An Act for the Repeal of Certain Statutes Concerning Treasons and Felonies, 1547 1 Edw. 6, ch. 12 (Eng.); 5 STAT. AT LARGE (Eng.) 259 (Danby Pickering ed., 1763).

⁴⁶⁸ Duke of Somerset's Trial, 1 Cobbett's State Trials 515 (1551); Duke of Norfolk's Trial, 1 Cobbett's State Trials 957 (1571); Trial of Sir Christopher Blunt, 1 Cobbett's State Trials 1409 (1600); Trial of Common Lord Macguire, 4 Cobbett's State Trials 654 (1645).

⁴⁶⁹ See *supra* note 182 and accompanying text.

⁴⁷⁰ See *supra* note 243 and accompanying text.

⁴⁷¹ Hardres 137, 139-40, 145 Eng. Rep. 419, 420-21 (Ex. 1658).

⁴⁷² HUDSON, *supra* note 243, at 64.

⁴⁷³ *Mico*, Hardres at 139, 145 Eng. Rep. at 420.

⁴⁷⁴ See *supra* note 262 and accompanying text.

⁴⁷⁵ 17 Howell's State Trials 1079 (1741).

⁴⁷⁶ See *supra* note 275 and accompanying text.

⁴⁷⁷ GILBERT, *supra* note 276 and accompanying text.

⁴⁷⁸ 1 Leach 115, 168 Eng. Rep. 160 (K.B. 1775).

⁴⁷⁹ 1 Leach 263, 168 Eng. Rep. 234 (K.B. 1783).

firmly in place, we might expect that references to *nemo* would inform any discussion of compelled confessions.

Emlyn's edition of Hale does discuss confessions obtained by compulsion ("menace or undue terror"). Although the context is not clear, it is reasonable to infer that Emlyn is concerned with admissibility rather than weight. It is also reasonable to infer that he regards unreliability as the reason for inadmissibility.⁴⁸⁰ There is no reference to *nemo*. It is neither cited nor rejected as a basis for inadmissibility. The reason for this may lie in the fact that Hale's work was a description of the law that had been developed in crown cases, that is, in "suits in the [monarch's] name for *criminal* offenses against his *crown* and dignity."⁴⁸¹ As of 1736, there was no reported case in which a confession had been held inadmissible on the explicit ground that it had been obtained in violation of *nemo*. Thus, there was no occasion for referring to it in the treatise, and the omission should not be thought significant.

In the *Trial of Charles White*, the defense counsel argued, and the recorder conceded, that a confession is inadmissible if "extorted by threats." Once again, there is no reference to *nemo*. However, neither the lawyer nor the recorder tendered any rationale for exclusion. That the confession was actually admitted does not contradict the thesis of this Article. In view of the fact that a timely objection to the confession had not been made, the recorder simply refused to let the defense lawyer inquire into whether the confession had been compelled.⁴⁸²

In his remarks on an immunity proposal in the House of Lords, Lord Carteret saw the *nemo tenetur* doctrine as the *source* of a requirement that a "confession" be voluntary. However, it is not clear whether he was referring to an extrajudicial confession or to a guilty plea. Thus, I cannot claim that Carteret's statement gives more than indirect support to the position I have taken in this article. In general, however, Carteret's statement is consistent with Hudson's treatise and with the defense lawyer's argument in *Mico*. Thus, as of 1742, when Carteret spoke, the doctrine was slowly emerging that, *as a result of nemo tenetur*, confessions had to be voluntary.

Twelve years later, Gilbert's treatise on evidence gave much sharper definition to the emerging rule by asserting that an extrajudicial confession is inadmissible if obtained by "compulsion." Under the most reasonable interpretation of the ambiguous text, *nemo* appears to be a reason for exclusion.⁴⁸³ Gilbert's statement, which supports the thesis of this article, is the earliest statement I have found that *nemo* requires the exclusion of compelled, extrajudicial confessions.

⁴⁸⁰ See *supra* note 414 and accompanying text.

⁴⁸¹ RICHARD BURN, A NEW LAW DICTIONARY 213 (London, T. Cadell 1792).

⁴⁸² See 17 Howell's State Trials 1079 (1741); see also *supra* notes 270-74 and accompanying text.

⁴⁸³ See *supra* notes 282-83 and accompanying text.

The development portended by Gilbert's treatise did not receive nourishment from the courts. *Rudd's Case* makes no reference to *nemo*, even though it contains a *dictum* that a confession is inadmissible if induced by threats or promises. Notwithstanding this omission, we should not infer that England's judges regarded *nemo* as irrelevant to exclusion. Far from rejecting *nemo*, the court never addresses any rationale for exclusion. What is more important, the fact situation would not have called the *nemo tenetur* doctrine to the court's attention. In order to take advantage of a discretionary practice in which an accomplice might receive a pardon after making a full confession that led to the conviction of the principal, Ms. Rudd filed a complaint charging the brothers Perreau with forcing her to forge a bond. After receiving a justice's promise that she would not be prosecuted if she made a full confession relating to all forgeries, she submitted to an examination and subsequently testified at the trial of the Perreaus. In seeming breach of the justice's promise, she was then prosecuted for forgery. On its face, the case appears to involve an unkept promise and consequent breach of the *nemo tenetur* doctrine. In fact, however, Ms. Rudd did not testify fully and truthfully at the examination. Hence, she did not fulfill the condition upon which the promise was made, and the promise was extinguished.⁴⁸⁴ Since she was not compelled to speak and the prosecution did not otherwise derogate from her privilege of silence, there was no occasion for the court even to think about *nemo tenetur*, much less apply it.

Rex v. Warickshall, which is the culmination of the confession-rule developments, similarly ignored what Gilbert adumbrated.⁴⁸⁵ At issue was the admissibility of tangible evidence to which the defendant's confession had led the authorities. The confession was made only after the defendant was apparently promised that she would not be prosecuted if she confessed. In derogation of the promise, however, a prosecution took place. Her confession was excluded, but the tangible evidence was admitted against her, and the court regarding as irrelevant the fact that the tangible evidence was the fruit of a broken promise held:

It is a mistaken notion, that the evidence of *confessions and facts* which have been obtained from prisoners by *promises or threats*, is to be rejected from a regard to *public faith* Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not intitled to credit [A] confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it; and therefore it is rejected.⁴⁸⁶

⁴⁸⁴ See *supra* notes 287-89 and accompanying text.

⁴⁸⁵ 1 Leach 263, 168 Eng. Rep. 234 (K.B. 1783).

⁴⁸⁶ 1 Leach 263-64, 168 Eng. Rep. 234-35 (Cent. Crim. Ct. 1783); see *supra* notes 292-96 and accompanying text.

It is hard to know what to make of this ambiguous passage. It may be read to say that reliability is the *sole* test for determining the admissibility of a confession. Although the court does not explicitly reject the *nemo tenetur* doctrine as a basis for exclusion, the passage may be read as implicitly rejecting it even when the confession was "forced from the mind . . . by the torture of fear." So read, the passage would accord no exclusionary effect whatsoever to the *nemo tenetur* doctrine and would contradict both Gilbert and the thesis of this article.

There are, however, two strong reasons for not reading the passage as a rejection of *nemo*. The first reason is that the court could hardly have been thinking about the doctrine. The defense lawyer did not call it to the court's attention. Instead, he spoke vaguely about "public faith." Moreover, the facts of the case did not alert the court to the potential applicability of *nemo tenetur*. The case involved a promise, rather than compulsion, and it would have taken an astute court to see that a broken promise could ever be within the coverage of *nemo tenetur*. The second reason is that even if the court had been alerted to *nemo*, the court could not properly have applied it. Although the confession and derivative evidence were obtained by means of a broken promise, the promise was made by a *private person*, not by a governmental actor, and the *nemo tenetur* doctrine was inapplicable. Thus, had the court thought about *nemo*, it would not have been able to use it, and it would have been forced to search for some other exclusionary doctrine.

It follows that although we are justified in extracting from *Warickshall* a reliability-based exclusionary rule and applying it to promises and private actions, we should not read *Warickshall* as contradicting Gilbert and rejecting a *nemo*-based exclusionary rule for confessions obtained by governmental compulsion. Rather, we should read it as giving firm expression to a relatively narrow, *supplementary* rule excluding putatively unreliable confessions that are obtained in conformity with the *nemo tenetur* doctrine. So read, *Warickshall* is fully consistent with the thesis of this Article.

Within two years after *Warickshall*, the courts decided four cases in which confessions were held inadmissible. In none of the cases was the *nemo tenetur* doctrine even referred to. However, for reasons similar to those discussed in connection with *Rudd* and *Warickshall*, we should not infer that the courts were rejecting the doctrine as a basis for exclusion. In *Rex v. Thompson*,⁴⁸⁷ a bill had been stolen from Thompson's employer. Thompson was subsequently apprehended by the Receiver-General, an official who was charged with the receipt of tax monies.⁴⁸⁸ Thompson admitted that he had possessed and

⁴⁸⁷ 1 Leach 291, 168 Eng. Rep. 248 (Cent. Crim. Ct. 1783).

⁴⁸⁸ 2 BENJAMIN V. ABBOTT, *DICTIONARY OF TERMS AND PHRASES USED IN AMERICAN AND ENGLISH JURISPRUDENCE* 386 (Cambridge, University Press: John Wilson & Son 1879). The opinion does not explain why the apprehension was made by the Receiver-General.

endorsed the bill, and offered a highly dubious explanation. The Receiver-General said, "[U]nless you give me a more satisfactory account I shall take you before a Magistrate."⁴⁸⁹ Thompson then confessed to stealing the bill. In holding the confession inadmissible, the court did not refer to *nemo*. However, it offered no rationale of any sort. Moreover, the facts hardly suggest a situation for applying *nemo*. The Receiver-General's statement was neither a threat nor a promise of benefit. Rather, he was saying that on the evidence already adduced, it was clear that Thompson had possessed a recently stolen bill, that Thompson's possession implied that he was the thief, and that if he could not give an *innocent* explanation, the Receiver-General would have to infer his guilt and charge him. This is simply a legally correct statement of what would happen if Thompson remained silent. Its purpose was not to obtain a confession, but to give Thompson an opportunity to exculpate himself. As such, it should not be barred by *nemo*, and no significance should be attributed to the court's failure to refer to *nemo*. Indeed, one wonders why the confession was excluded on any ground.

In *Rex v. Mosey*, the defendant's induced confession was excluded, but derivative evidence was admitted, as in *Warickshall*.⁴⁹⁰ However, the report does not disclose *who* induced the defendant to speak or *what* the inducement was. Thus, we do not know whether *nemo* could have applied, and we should not infer from the court's silence that *nemo* was believed to be irrelevant. In *Rex v. Cass*,⁴⁹¹ the court held inadmissible a confession induced by the victim's promise of favor. That the court did not refer to *nemo* as a basis for exclusion may be explained by the fact that private action is not governed by the doctrine. Finally, in *Rex v. Lockhart*,⁴⁹² the court, without referring to *nemo*, excluded a confession that had been induced by a promise of favor, but admitted the testimony of a derivative witness. However, the report does not disclose *who* made the promise. Thus, as in *Mosey*, we do not know whether *nemo* could have applied, and we should not infer from the court's silence that *nemo* was believed to be irrelevant.

As the eighteenth century drew to a close, the situation in England was that secondary authorities gave some support to the proposition that a governmentally compelled confession was inadmissible *by virtue of* the *nemo tenetur* doctrine. The cases in which confessions were actually excluded neither accepted nor rejected that proposition. Indeed, they did not mention it. However, in none of these cases was the confession obtained as a result of a violation of *nemo tenetur*. Hence, none of the cases called for a consideration of the doctrine.

⁴⁸⁹ *Thompson*, 1 Leach at 292, 168 Eng. Rep. at 249.

⁴⁹⁰ 1 Leach 265 n.(a), 168 Eng. Rep. at 235 n.(a) (Cent. Crim. Ct. 1784).

⁴⁹¹ 1 Leach at 293-94 n.(a), 168 Eng. Rep. at 249 n.(a) (Cent. Crim. Ct. 1784).

⁴⁹² 1 Leach 386, 168 Eng. Rep. 295 (Cent. Crim. Ct. 1785).

The English cases decided during the first half of the nineteenth century present a roughly similar picture. English courts held confessions inadmissible in no fewer than twenty-eight cases.⁴⁹³ Fourteen of the cases involved threats or unkept promises made by nongovernmental actors to whom the *nemo tenetur* doctrine was inapplicable.⁴⁹⁴ That the doctrine was not referred to as the basis for exclusion is therefore understandable. In two other cases, the report does not disclose whether the person whose unkept promise induced the confession was governmental or private.⁴⁹⁵ In the remaining 12 cases, the confession was induced by a governmental actor. In eight of the cases, however, the inducement did not violate *nemo tenetur*, being neither an unkept promise or

⁴⁹³ In chronological order the cases are *Rex v. Jones, Russ. & Ry.* *152, 168 Eng. Rep. 733 (Cr. Cas. Res. 1809); *Rex v. Wilson*, Holt's Rep. 597, 171 Eng. Rep. 353 (C.P. 1817); *Rex v. Kingston*, 4 Car. & P. 387, 172 Eng. Rep. 752 (Norfolk Cir. 1830); *Rex v. Dunn*, 4 Car. & P. 543, 172 Eng. Rep. 817 (Oxford Cir. 1831); *Rex v. Parratt*, 4 Car. & P. 570, 172 Eng. Rep. 829 (Oxford Cir. 1831); *Rex v. Richards*, 5 Car. & P. 318, 172 Eng. Rep. 993 (Oxford Cir. 1832); *Rex v. Cooper*, 5 Car. & P. 535, 172 Eng. Rep. 1087 (Oxford Cir. 1833); *Rex v. Enoch*, 5 Car. & P. 539, 172 Eng. Rep. 1089 (Oxford Cir. 1833); *Rex v. Mills*, 6 Car. & P. 146, 172 Eng. Rep. 1183 (Oxford Cir. 1833); *Rex v. Lewis*, 6 Car. & P. 161, 172 Eng. Rep. 1190 (Oxford Cir. 1833); *Rex v. Walkley*, 6 Car. & P. 175, 172 Eng. Rep. 1196 (Oxford Cir. 1833); *Rex v. Davis*, 6 Car. & P. 177, 172 Eng. Rep. 1196 (Oxford Cir. 1833); *Rex v. Simpson*, 1 Mood. 410, 168 Eng. Rep. 1323 (Cr. Cas. Res. 1834); *Rex v. Thomas*, 6 Car. & P. 353, 172 Eng. Rep. 1273 (Oxford Cir. 1834); *Rex v. Partridge*, 7 Car. & P. 551, 173 Eng. Rep. 243 (Oxford Cir. 1836); *Rex v. Shepherd*, 7 Car. & P. 579, 173 Eng. Rep. 255 (Home Cir. 1836); *Rex v. Upchurch*, 1 Mood. 465, 168 Eng. Rep. 1346 (Cr. Cas. Res. 1836); *Reg. v. Drew*, 8 Car. & P. 140, 173 Eng. Rep. 433 (Oxford Cir. 1837); *Reg. v. Taylor*, 8 Car. & P. 726, 173 Eng. Rep. 691 (Oxford Cir. 1839); *Reg. v. Hearn, Car. & M.* 109, 174 Eng. Rep. 431 (Oxford Cir. 1841); *Reg. v. Hornbrook*, 1 Cox Crim. Cas. 54 (Western Cir. 1843); *Reg. v. Furley*, 1 Cox Crim. Cas. 76 (Cent. Crim. Ct. 1844); *Reg. v. Harris*, 1 Cox Crim. Cas. 106 (So. Wales Cir. 1844); *Reg. v. Croydon*, 2 Cox Crim. Cas. 67 (Western Cir. 1846); *Reg. v. Laugher*, 2 Car. & K. 225, 175 Eng. Rep. 93 (Oxford Cir. 1846); *Queen v. Garbett*, 2 Cox Crim. Cas. 448 (Ex. 1847); *Reg. v. Collier*, 3 Cox Crim. Cas. 57 (Wiltshire Assizes 1848); *Reg. v. Garner*, 1 Denison Cr. Cas. Res. 329, 169 Eng. Rep. 267 (Cr. Cas. Res. 1848).

⁴⁹⁴ In chronological order, the cases are *Jones, Russ. & Ry.* at *152, 168 Eng. Rep. at 733; *Kingston*, 4 Car. & P. at 387, 172 Eng. Rep. at 752; *Dunn*, 4 Car. & P. at 543, 172 Eng. Rep. at 817; *Parratt*, 4 Car. & P. at 570, 172 Eng. Rep. at 829; *Richards*, 5 Car. & P. at 318, 172 Eng. Rep. at 993; *Enoch*, 5 Car. & P. at 539, 172 Eng. Rep. at 1089; *Simpson*, 1 Mood. at 410, 168 Eng. Rep. at 1323; *Partridge*, 7 Car. & P. at 551, 173 Eng. Rep. at 243; *Upchurch*, 1 Mood. at 465, 168 Eng. Rep. at 1346; *Taylor*, 8 Car. & P. at 726, 173 Eng. Rep. at 691; *Hearn, Car. & M.* at 109, 174 Eng. Rep. at 431; *Croydon*, 2 Cox Crim. Cas. at 67; *Collier*, 3 Cox Crim. Cas. at 57; *Garner*, 1 Denison Cr. Cas. Res. at 329, 169 Eng. Rep. at 267.

⁴⁹⁵ *Walkley*, 6 Car. & P. at 161, 172 Eng. Rep. at 1190; *Thomas*, 6 Car. & P. at 353, 172 Eng. Rep. at 1273.

any form of compulsion.⁴⁹⁶ Thus, there was no occasion for the courts to discuss the doctrine, and their failure to do so is not significant. In another case, the report does not disclose whether a magistrate did or did not keep his benign promise to help the suspect.⁴⁹⁷ Three cases remain. In *Rex v. Wilson*,⁴⁹⁸ a confession was held inadmissible on the ground that a magistrate's examination implies an obligation to answer. The report does not indicate, however, whether the obligation was regarded as inconsistent with *nemo tenetur* or with some independent doctrine. In *Regina v. Laughler*,⁴⁹⁹ a confession was excluded because the defendant's husband, under whose influence she was presumed to be, urged her, in the presence of a constable, to tell the truth. Again, the report does not mention the rationale for exclusion. Finally, in *Queen v. Garbett*,⁵⁰⁰ a confession was excluded because the defendant, in an earlier bankruptcy proceeding, had been judicially ordered to confess. Although the report does not clearly state the rationale for exclusion, the reasonable inference is that the confession was excluded because it had been obtained in violation of *nemo tenetur*. The defense counsel called the court's attention to the doctrine, relying on it as a basis for saying that the defendant's answers had been obtained improperly.⁵⁰¹ The prosecutor did not deny the relevance of *nemo*. Rather, his argument was that the defendant had waived his privilege by answering some of the questions without objection.⁵⁰² Most of the court's questions during the oral argument related to waiver of the privilege.⁵⁰³ The report concludes:

The learned Judges afterwards deliberated upon the case, and nine of them were of opinion that the witness, under the circumstances, was not compellable to answer the questions put; and that, having answered them under compulsion, such answers could not be given in evidence against him on a

⁴⁹⁶ *Mills*, 6 Car. & P. at 146, 172 Eng. Rep. at 1183 (police officer said that a certain person would testify against the defendant); *Lewis*, 6 Car. & P. at 161, 172 Eng. Rep. at 1190 (magistrate examined a suspect on oath in violation of settled practice); *Davis*, 6 Car. & P. at 177, 172 Eng. Rep. at 1196 (same); *Shepherd*, 7 Car. & P. at 579, 173 Eng. Rep. at 255 (constable told suspect not to add a lie to his misdeeds); *Drew*, 8 Car. & P. at 140, 173 Eng. Rep. at 433 (magistrate's clerk said that suspect's confession could be used for or against him); *Hornbrook*, 1 Cox Crim. Cas. at 54, (constable said the he would be willing to hear what suspect had to say); *Furley*, 1 Cox Crim. Cas. at 76 (constable said that suspect's confession would be used against him at his trial); *Harris*, 1 Cox Crim. Cas. at 106 (same).

⁴⁹⁷ *Cooper*, 5 Car. & P. 535, 172 Eng. Rep. 1087 (Oxford Cir. 1833).

⁴⁹⁸ Holt's Rep. 597, 171 Eng. Rep. 353 (C.P. 1817).

⁴⁹⁹ 2 Car. & P. 225, 175 Eng. Rep. 93 (Oxford Cir. 1846).

⁵⁰⁰ 2 Cox Crim. Cas. 448 (Ex. 1847).

⁵⁰¹ *Id.* at 453.

⁵⁰² *Id.* at 457-59.

⁵⁰³ *Id.* at 454-62.

criminal charge. The remaining six thought the evidence receivable, and the prisoner properly convicted.⁵⁰⁴

Although the words "*nemo tenetur*" are not used in the quoted passage, the words "compellable" and "compulsion," in the context of the oral argument, strongly imply that the defendant's answers were excluded by virtue of the *nemo tenetur* doctrine.⁵⁰⁵ So read, *Garbett* appears to be the first English case giving *nemo* an exclusionary effect.

Of the twenty-eight cases in which confessions were held inadmissible during the first half of the nineteenth century, none contradicts the thesis of this article and *Garbett* appears to support it. Further support may be derived from some of the many cases of roughly the same period in which confessions were held admissible. The earliest of these cases is *Smith v. Beadnell*.⁵⁰⁶ A witness at a bankruptcy proceeding answered incriminating questions although he might have invoked *nemo tenetur*. At a subsequent civil proceeding the answers were held admissible, the court implying that they would have been inadmissible had they been obtained in violation of *nemo*. Similar holdings, with similar implications, were made in *Rex v. Haworth*⁵⁰⁷ and *Regina v. Sloggett*.⁵⁰⁸

The only case of this era that merits extended discussion is *Regina v. Scott*.⁵⁰⁹ Scott was a bankrupt who, at a bankruptcy examination, was asked incriminating questions relating to his estate and business dealings, the *nemo tenetur* protection having been partially abrogated by the bankruptcy law. His answers were deemed unsatisfactory by the examiner, and he was threatened with jail. Thereafter, he gave incriminating answers which the prosecution used against him in a subsequent criminal case. On appeal, Scott's lawyer referred to both *nemo tenetur* and the voluntariness rule as bases for inadmissibility, apparently perceiving them to be separate, and the court discussed them separately. Its discussion of *nemo tenetur* makes clear that confessions obtained

⁵⁰⁴ *Id.* at 462.

⁵⁰⁵ *Garbett* has been read as basing exclusion on *nemo tenetur*; see *Reg. v. Scott*, 1 Dears. & Bell 47, 169 Eng. Rep. 909 (Cr. Cas. Res. 1856); 3 WIGMORE, *supra* note 80, § 850, at 519.

⁵⁰⁶ 1 Camp. 30, 170 Eng. Rep. 865 (K.B. 1807).

⁵⁰⁷ 4 Car. & P. 254, 172 Eng. Rep. 693 (Northern Cir. 1830). Haworth, a witness at the preliminary examination of another person, answered incriminating questions without asserting his *nemo tenetur* objection. His answers were held admissible against him at a subsequent criminal trial.

⁵⁰⁸ 7 Cox Crim. Cas. 139 (Eng. Crim. App. 1856). Under English bankruptcy law, which partially abrogated the *nemo tenetur* protection, Sloggett, a bankrupt, was required to answer questions about his estate and his business dealings. Although the abrogation of the privilege did not extend further, Sloggett also answered other incriminating questions without asserting his *nemo tenetur* protection. The answers to these questions were held admissible at a subsequent criminal proceeding.

⁵⁰⁹ 1 Dears. & Bell 47, 169 Eng. Rep. 909 (Cr. Cas. Res. 1856).

in violation of the protection are inadmissible by virtue of the protection.⁵¹⁰ Nevertheless, the court easily dispatched Scott's *nemo* argument by noting that as a result of the abrogation of the *nemo* protection, Scott's incriminating answers had not been obtained in violation of the protection.⁵¹¹ The court also dispatched Scott's involuntariness argument.

It is a trite maxim that the confession of a crime, to be admissible against the party confessing, must be voluntary; but this only means that it shall not be induced by *improper* threats or promises, because, under such circumstances, the party may have been influenced to say what is not true, and the supposed confession cannot be safely acted upon. *Such an objection cannot apply to a lawful examination in the course of a judicial proceeding.* Then the defendant's counsel objects that, in the course of this examination, threats were used; the alleged threats, however, were merely an explanation of the enactment of the Legislature upon the subject, and a warning to the defendant of the consequences which, in point of law, would arise from his refusing to give a true answer to the questions put to him.⁵¹²

The court's handling of the involuntariness issue is unsatisfactory. If, as the court seems to accept, there is a reliability-based voluntariness rule that is separate from *nemo*, the only question should be whether there is a real risk that the inducement will produce a false confession. In fact, incriminating answers obtained by the threat of jail may be unreliable. In *Scott*, the bankrupt knew that his interrogators were dissatisfied with his answers and that he would be committed unless he changed them. As noted earlier in this Article, a person in Scott's situation might seek to avoid immediate confinement by giving a desired, but false, answer and taking his chances with the more remote risk of conviction and consequent confinement.⁵¹³ But the court never even discussed the matter. Instead of considering the *content* of the threat in determining whether Scott's answers were putatively unreliable, the court simply asked whether the threat was *authorized by the legislature*. Authorization, however, is irrelevant to reliability. After all, if the legislature had authorized torture to obtain information from recalcitrant bankrupts, their torture-induced statements could hardly be deemed reliable. Thus, it makes no sense for the court to insist that reliability is determined by authorization.

Why did the *Scott* court take such a patently weak position? The answer is, I suspect, that the court knew the result it wanted to reach, but did not know how to get there. It did not want to hold the statements inadmissible under the involuntariness rule if they were admissible under *nemo* by virtue of the

⁵¹⁰ *Id.* at 57, 59.

⁵¹¹ *Id.* at 59–60.

⁵¹² *Id.* at 58–59 (emphasis added).

⁵¹³ See *supra* notes 442–44 and accompanying text.

bankruptcy statute. The statements were admissible under *nemo* because the compulsion was "authorized by the legislature." Not perceiving any easier way to avoid the involuntariness rule, the court took the *nemo*-related factor of authorization and used it to parry Scott's *involuntariness* argument.

There was, however, a simpler and more direct way to avoid the involuntariness argument. The thesis of this Article is that the involuntariness rule should be applied only if the *nemo* protection is *inherently* inapplicable. If a confession is obtained by governmental compulsion, *nemo tenetur* supplies full protection, including exclusion, and there is no need for an involuntariness rule. If, for whatever reason, the legislature is willing to *authorize* governmental compulsion, it is then willing to forgo all the values underlying the *nemo tenetur* doctrine, including reliability. In *Scott*, therefore, the court should have said that the defendant's involuntariness argument was irrelevant because *nemo* would have been applicable but for the legislative abrogation.⁵¹⁴

To the extent that *Scott* recognizes separate *nemo* and involuntariness protections in a case of governmental compulsion, it implicitly denies the thesis of this Article. To the extent that it avoids the involuntariness argument by using a factor that is relevant to *nemo* analysis only, it absorbs involuntariness into *nemo* and implicitly supports the thesis of this Article.

2. American Materials

Through 1850, American courts excluded confessions in twenty-four reported cases.⁵¹⁵ In none of these cases was *nemo tenetur* said to be the basis

⁵¹⁴ Bear in mind that I am discussing only the common law *nemo* protection at this point. I do not intend to suggest that the constitutional protection could be trumped legislatively.

⁵¹⁵ In chronological order, the inadmissibility cases through 1850 are *Commonwealth v. Chabcock*, 1 Mass. *144 (1804) (victim made promise of favor); *Jackson's Case*, 1 City Hall Recorder (Rogers) 28 (N.Y. Ct. Sess. 1816) (victim promised not to prosecute; confession inadmissible, but tangible property to which confession led, admissible); *Thorn's Case*, 4 City Hall Recorder (Rogers) 81 (N.Y. Gen. Sess. 1819) (bank president promised embezzler that he would be allowed to turn state's evidence if he confessed); *Milligan's Case*, 6 City Hall Recorder (Rogers) 64 (N.Y. Gen. Sess. 1821) (victim promised not to prosecute); *State v. Guild*, 10 N.J.L. 163 (1828) (private promise that suspect "would probably get clear" and that it would be "better" to confess); *Hector v. State*, 2 Mo. 166 (1829) (torture by persons unconnected with case); *State v. Phelps*, 11 Vt. 116 (1839) (shareholder of bank promised defendant favorable treatment); *Boyd v. State*, 21 Tenn. (2 Hum.) 39 (1840) (promise to try to induce victim to drop prosecution); *Peter v. State*, 7 Miss. (4 S. & M.) *31 (1844) (persons unconnected with case threatened to hang suspect); *State v. Bostick*, 4 Del. (4 Harr.) 563 (Ct. Err. & App. 1845) (suspect's mistress promised that there would be no prosecution); *State v. Clarissa*, 11 Ala. *57 (1847) (slave whipped by owner); *State v. Nelson*, 22 La. (3 La. Ann.) *497 (1848) (son of suspect's employer said it would be better to confess); *People v. Rankin*, 2 Wheeler Crim. Cas. 467 (N.Y. Oyer &

for the exclusion. However, in thirteen of the cases, threats or unkept promises were made by nongovernmental actors to whom *nemo* is inapplicable.⁵¹⁶ That the doctrine was not mentioned in these cases is therefore understandable and not significant. In three cases, the report does not disclose whether the confession was induced by a governmental or nongovernmental actor.⁵¹⁷ In the remaining eight cases, the confession was induced by a governmental actor.⁵¹⁸ In two of these cases, however, the report does not disclose whether a benign promise was kept.⁵¹⁹ Four of the remaining cases of governmental action involve unkept promises.⁵²⁰ I stated earlier in this Article that the *nemo tenetur* doctrine should be deemed violated when an incriminating statement is obtained by a benign, unkept, governmental promise, and that the incriminating

Term. 1807) (officer threatened to put suspect in dark room and hang him); *State v. Aaron*, 4 N.J.L. *231 (1818) (grand jurors' statement to suspect that it would be better to tell the truth construed as a promise of benefit); *United States v. Pocklington*, 27 F. Cas. 580 (C.C.D.C. 1822) (No. 16,060) (magistrate promised to try to get a light sentence for the suspect); *People v. Robertson*, 1 Wheeler Crim. Cases 66 (N.Y. Rec. Ct. 1822) (constable told suspect's wife it would be better if he confessed); *United States v. Richard*, 27 F. Cas. 798 (C.C.D.C. 1823) (No. 16,154) (unspecified promise; tangible evidence admissible); *State v. Roberts*, 12 N.C. (1 Dev. & Bat. Eq.) *259 (1827) (promise that confession would be inadmissible); *State v. Brick*, 2 Del. (2 Harr.) 530 (Gen. Sess. 1835) (suspect told it would be better if he confessed; confession inadmissible, but tangible evidence admissible); *People v. Ward*, 15 Wend. 231 (N.Y. 1836) (magistrate said it would be better for suspect to confess); *Commonwealth v. Harman*, 4 Pa. 269 (1846) (magistrate threatened to commit suspect and told her it would be better to tell the truth); *Couley v. State*, 12 Mo. *462 (1849) (police officer said that it would be better for the suspect to confess and that the officer would not divulge the confession); *Spence v. State*, 17 Ala. *192 (1850) (slave who had invariably been whipped for misconduct confessed after being tied and left with third person; held that trial court should have permitted defendant to prove that he had been whipped on prior occasions); *Commonwealth v. Taylor*, 59 Mass. (5 Cush.) 605 (1850) (police officer said he would try to help suspect).

⁵¹⁶ The cases in chronological order are *Chabbock*, 1 Mass. *144; *Jackson*, 1 City Hall Recorder (Rogers) at 28; *Thorn*, 4 City Hall Recorder (Rogers) at 81; *Milligan*, 6 City Hall Recorder (Rogers) at 64; *Guild*, 10 N.J.L. at 163; *Hector*, 2 Mo. at 166; *Phelps*, 11 Vt. at 116; *Boyd*, 21 Tenn. (2 Hum.) at 39; *Peter*, 7 Miss. (4 S. & M.) at *31; *Bostick*, 4 Del. (4 Harr.) at 563; *Clarissa*, 11 Ala. at *57; *Nelson*, 22 La. (3 La. Ann.) at *497; *Spence*, 17 Ala. at *192.

⁵¹⁷ The cases in chronological order are *Richard*, 27 F. Cas. at 798; *Roberts*, 12 N.C. at *259; *Brick*, 2 Del. at 530.

⁵¹⁸ The cases in chronological order are *Rankin*, 2 Wheeler Crim. Cas. at 467; *Aaron*, 4 N.J.L. at *231; *Pocklington*, 27 F. Cas. at 580; *Robertson*, 1 Wheeler Crim. Cas. at 66; *Ward*, 15 Wend. at 231; *Harman*, 4 Pa. at 269; *Couley*, 12 Mo. at *462; *Taylor*, 6 Mass. at 605.

⁵¹⁹ The cases in chronological order are *Pocklington*, 27 F. Cas. at 580; *Taylor*, 6 Mass. at 605.

⁵²⁰ The cases in chronological order are *Aaron*, 4 N.J.L. at *231; *Robertson*, 1 Wheeler Crim. Cas. at 66; *Ward*, 15 Wend. at 231; *Couley*, 12 Mo. at *462.

statements should be inadmissible by virtue of *nemo tenetur alone*.⁵²¹ At the same time, I recognized that the issue was close and that there was a plausible counter-argument that the *nemo tenetur* protection is never violated by a benign promise.⁵²² Whichever way one might resolve this matter, little significance should be attributed to the fact that American courts did not rely on *nemo tenetur* as a basis for excluding promise-induced statements. If one accepts the counter-argument, *nemo* is irrelevant and judicial silence is therefore insignificant. On the other hand, the basic position, which is quite sophisticated and value-oriented, would not readily occur to most lawyers and judges. Rather, they would simply assume that the *nemo tenetur* protection, which grew out of conditions of torture and other abuse, was limited to those conditions. Their silence, therefore, in cases of benign promises, may indicate shortsightedness, but it does not contradict the thesis of this Article.

Of the twenty-four cases through 1850 in which American courts held confessions inadmissible, in none was the confession obtained by governmental force and in only two were the confessions obtained by threat. In *People v. Rankin*, a police officer said to a suspect, "[i]f you do not tell all you know about the business, you will be put in the dark room and hanged."⁵²³ In *Commonwealth v. Harman*, a magistrate placed a suspect under oath and then threatened to commit her if she did not tell the truth.⁵²⁴ Although both confessions were obviously obtained in violation of *nemo tenetur*, in neither case was the doctrine even mentioned. In *Rankin*, the court excluded the confession as involuntary. In *Harman*, the court held that the threat made the confession inadmissible, but it did not say why. In addition, the court held that the oath made the confession inadmissible, but again the court gave no reason. *Harman* is not inconsistent with the thesis of this Article, but *Rankin* is.

Although the American exclusionary cases fail to support the thesis of this Article, a modicum of support comes from two of the cases in which confessions were admitted. In *Commonwealth v. Drake*⁵²⁵ and *State v. Broughton*,⁵²⁶ the defendant claimed that his confession was involuntary and inadmissible. In both cases, the court equated involuntariness with compulsion under *nemo tenetur*. Finding no compulsion in violation of *nemo tenetur*, the court held that the statement was voluntary and admissible. In common with their English counterparts—*Beadnell*, *Haworth*, and *Sloggett*⁵²⁷—the two

⁵²¹ See *supra* notes 458–62 and accompanying text.

⁵²² See *Id.*

⁵²³ 2 Wheeler Crim. Cas. 467, 469 (N.Y. Oyer & Term. 1807).

⁵²⁴ 4 Pa. 269 (1846).

⁵²⁵ 15 Mass. 161 (1818).

⁵²⁶ 29 N.C. (7 Ired.) 96 (1846).

⁵²⁷ *Smith v. Beadnell*, 1 Camp. 30, 170 Eng. Rep. 865 (K.B. 1807); *Rex v. Haworth*, 4 Car. & P. 254, 172 Eng. Rep. 693 (Northern Cir. 1830); *Reg. v. Sloggett*, 7 Cox Crim.

American cases imply that a confession is inadmissible if obtained by conduct that violates the *nemo tenetur* protection.

3. *Evaluating the English and American Exclusionary Materials*

An interesting and revealing pattern emerges when we combine the English and American cases in which confessions were excluded during the first half of the nineteenth century. Confessions were excluded in fifty-two cases. Only one of the cases—*Garbett*—can fairly be read as basing exclusion on the *nemo tenetur* doctrine. In the remaining cases, either the rationale underlying exclusion is unstated or the involuntariness doctrine is used. However, in over half the cases (thirty-two), the confession was induced either by a nongovernmental actor to whom *nemo* is inapplicable (twenty-seven) or by a person whose identity is undisclosed (five). Moreover, twenty-five of the thirty-two cases involve promises—the inducement least likely to be perceived by a court as offending *nemo*.

In twenty of the English and American cases, the confession was obtained by a governmental actor. In these cases, the nature of the inducement becomes crucial in determining whether *nemo* could be used as a basis for exclusion. In eight of the cases, the inducement was neither compulsion nor an unkept promise and therefore was outside the scope of the *nemo* protection. Seven of the remaining twelve cases involve promises—again, the inducement least likely to be perceived by a court as offending *nemo*. In only five of the fifty-two cases was the excluded confession obtained by a governmental threat. In three of the opinions, the rationale for exclusion was unstated; in one—*Rankin*—the court relied on the voluntariness rule; and in the remaining case—*Garbett*—the court probably relied on *nemo*.

The cases of exclusion of confessions in England and America through 1850 are dominated by situations in which the *nemo* protection does not apply (nongovernmental inducement) or in which the protection does not *obviously* apply (promises, whether kept or unkept).⁵²⁸ At the head of, and clearly

Cas. 139 (Eng. Crim. App. 1856). The English cases are discussed *supra* at notes 506–08 and accompanying text.

⁵²⁸ The same is true of English and American cases in which the confession was admitted. During the period under consideration, American courts admitted confessions in 15 reported cases. In chronological order, the cases are *Commonwealth v. Dillon*, 4 Dall. 116 (Pa. 1792); *State v. Moore*, 2 N.C. (1 Hayw.) 482 (Super. Ct. 1797); *Trial of Northampton Insurgents (Fries' Case)* (C.C.D.Pa. 1799), in FRANCIS WHARTON, *STATE TRIALS OF THE UNITED STATES* 458 (Philadelphia, Carey & Hart 1799); *Williams' Case*, 1 City Hall Recorder (Rogers) 149 (N.Y. Ct. Sess. 1816); *Commonwealth v. Drake*, 15 Mass. 161 (1818); *Bowerhan's Case*, 4 City Hall Recorder (Rogers) 136 (N.Y. Gen. Sess. 1819); *Stage's Case*, 5 City Hall Recorder (Rogers) 177 (N.Y. Gen. Sess. 1820); *State v. Guild*, 10 N.J.L. 163 (1828); *Commonwealth v. Knapp*, 27 Mass. (10 Pick.) 477 (1830);

influencing, the entire line of cases stands *Warickshall*. In that case, which involved a nongovernmental promise to which *nemo tenetur* was not applicable, the court had to use a reliability-based involuntariness doctrine as the ground for exclusion. Its ambiguous dictum, however, might be read as implying that involuntariness is the only basis for exclusion, even in a case of governmental compulsion. This reading would leave the *nemo tenetur* protection as a device for fending off interrogation, but with no exclusionary force of its own, a position that has not been taken on either side of the Atlantic.⁵²⁹ It is likely that lawyers and judges in the immediate post-*Warickshall* era looked to *Warickshall* and took its dictum at face value because it was the first reported case in which a confession was excluded from evidence. It is also likely that they were misled by the facts of the post-*Warickshall* cases which overwhelmingly fell outside the scope of *nemo*.⁵³⁰ These two factors combined to deflect them from considering *nemo tenetur* as a basis for exclusion. Had they thought about it, they would have seen that *nemo* must have an exclusionary effect; that one of the values underlying *nemo*

State v. Harman, 3 Del. (3 Harr.) 567 (1839-42); Hawkins v. State, 7 Mo. 190 (1841); State v. Grant, 22 Me. 171 (1842); State v. Broughton, 29 N.C. (7 Ired.) 96 (1846); State v. Cowan, 29 N.C. 139 (1847); State v. Kirby, 32 S.C.L. (1 Strob.) 378 (1847). Five of the cases involve neither threats nor promises (*Fries, Drake, Grant, Broughton, and Cowan*). Six of the cases involve promises (*Bowerhan, Guild, Knapp, Harman, Hawkins, and Kirby*). Eight of the cases involve non-governmental actors (*Moore, Bowerhan, Drake, Stage, Guild, Harman, Grant, and Kirby*), and two cases fail to disclose who induced the confession (*Williams and Hawkins*). The American cases are thus dominated both by actors to whom the *nemo tenetur* prohibition is not applicable and by actions that are not obviously within the scope of the prohibition.

By contrast to the American cases, only one of the English admissibility cases involves a non-governmental actor. Rex v. Gilham, 1 Mood. 186, 168 Eng. Rep. 1234 (Cr. Cas. Res. 1828). All of the remaining 11 cases involve governmental actors. In 10 of these cases, the confession was obtained by neither compulsion nor a promise. Smith v. Beadnell, 1 Camp. 30, 170 Eng. Rep. 865 (K.B. 1807); Rex v. Thornton, 1 Mood. 27, 168 Eng. Rep. 1171 (Cr. Cas. Res. 1824); Rex v. Ellis, Ry. & Mood. 432, 171 Eng. Rep. 1073 (Nisi Prius 1826); Rex v. Clewes, 4 Car. & P. 221 (Oxford Cir. 1830); Wright's Case, 1 Lewin 48, 168 Eng. Rep. 954 (York Spl. Assizes 1830); Rex v. Haworth, 4 Car. & P. 254, 172 Eng. Rep. 693 (Northern Cir. 1830); Rex v. Fagg, 4 Car. & P. 566, 172 Eng. Rep. 828 (Home Cir. 1831); Reg. v. Kerr, 8 Car. & P. 176, 173 Eng. Rep. 449 (Centr. Crim. Ct. 1837); Reg. v. Sandys, Car. & M. 345, 174 Eng. Rep. 536 (Chester Assizes 1841); Reg. v. Sloggett, 7 Cox Crim. Cas. 139 (Eng. Crim. App. 1856). In the remaining case, the confession was obtained by a threat of jail as permitted by the English bankruptcy law. Wheater's Case, 2 Lewin 157, 168 Eng. Rep. 1113 (Cr. Cas. Res. 1838). The English cases are therefore dominated by actions that clearly fall outside the scope of *nemo*.

⁵²⁹ See *supra* notes 378-79 and *infra* note 560 and accompanying text.

⁵³⁰ It is significant that the first reported American decision excluding a confession was *Commonwealth v. Chabcock*, 1 Mass. 144 (1804), the facts of which are similar to *Warickshall*.

exclusion, albeit a subsidiary value, is reliability; and that the exclusionary effect of *nemo* in cases of governmental compulsion leaves no room for an independent, reliability-based, exclusionary rule. But they did not think about *nemo*, and, with few exceptions, neither urged it nor used it to exclude confessions in the cases with which they were concerned. Instead, they used *Warickshall*'s reliability-based exclusionary rule as the theory of choice even in cases in which it was clear that *nemo* had been violated.⁵³¹ By following the path of least resistance, they inadvertently created two lines of cases, one involving the permissibility of sanctions for refusal to answer (the *nemo* line), the other involving the exclusion of confessions (the involuntariness line). These two lines in turn misled most of the early writers of treatises whose works were intended to reflect the current state of the law rather than to criticize and shape it. As a result, they described two separate and independent protections,⁵³² thus giving continued momentum to the dominance of the confession rule over *nemo* as the device for exclusion. Unlike many of his predecessors, however, Wigmore was not reluctant to criticize the law, and sought to influence its development. Yet even he accepted *Warickshall*'s thoughtless dictum. What is more, he became its most vigorous advocate. One does not lightly disagree with Wigmore, but the time has come to say that he was largely wrong.

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⁵³¹ *People v. Rankin*, 2 Wheeler Crim. Cas. 467 (N.Y. Oyer & Term. 807) is an example.

⁵³² Treatises are discussed *supra* notes 305–15 and accompanying text.

